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Filed

April 14. 1879

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 369

TALMADGE E. BROWN AND WIFE, APPELLANTS,

v. } *Original Bill.*

JOHN D. F. SLEE, ET AL., EXECUTORS,

AND

TALMADGE E. BROWN, APPELLANT,

v. } *Cross-Bill.*

JOHN D. F. SLEE, ET AL., EXECUTORS.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED OCTOBER 14 1878.

SUPREME COURT OF THE UNITED STATES.

No. .....

TALMADGE E. BROWN AND WIFE, APPELLANTS,

v. { *Original Bill.*

JOHN D. F. SLEE, ET AL., EXECUTORS,

AND

TALMADGE E. BROWN, APPELLANT,

v. { *Cross-Bill.*

JOHN D. F. SLEE, ET AL., EXECUTORS.

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United States Circuit Court, District of Iowa.

JOHN D. F. SLEE ET AL., Executors,
vs.
TALMADGE E. BROWN and ANNA L. BROWN.
No. 736. EQUITY.

TRANSCRIPT.

Pleas in the Circuit Court of the United States of America in and for the district of Iowa, at a term thereof, begun and holden at the United States court room in the city of Des Moines and District aforesaid, on the 13th day of May, the same being the second Monday of May, A. D. 1876, before the Honorable John F. Dillon, United States circuit judge for the eighth circuit, and Honorable J. M. Love, United States district judge for the district of Iowa.

Be it remembered, that heretofore, to-wit: On the 19th day of July, A. D. 1876, John D. F. Slee *et al.*, executors of the estate of Jarvis Langdon, deceased, by Messrs. Nourse & Kauffman, filed in the clerk's office of the United States Circuit Court, in and for the District of Iowa, their bill of complaint, against Talmadge E. Brown and Anna L. Brown. Which bill of complaint is in words and figures following, to-wit:

1 In the United States Circuit Court, District of Iowa.

JOHN D. F. SLEE, CHARLES J. LANGDON, THEODORE W. CRANE (OLIVIA L. LANGDON)* and SAMUEL L. CLEMENS, executors of JARVIS LANGDON, deceased,
vs.
TALMADGE E. BROWN, and ANNA L. BROWN, his wife.
No. Bill in Chancery.

To the said circuit court of the United States, in chancery:

Your orators, John D. F. Slee, Charles J. Langdon, Theodore W. Crane (Olivia L. Langdon)* and Samuel L. Clemens, executors of Jarvis Langdon, deceased, citizens of the State of New York, and residents of said State, humbly complaining of Talmadge E. Brown and Anna L. Brown, citizens of the State of Iowa, and residents of the city of Des Moines in said State, whom your orators pray may be made parties defendant to this bill, show to the court:

2 That heretofore, to-wit: prior to the 6th day of August, 1870, one Jarvis Langdon, now deceased, and the respondent, Talmadge E. Brown, were associated together under the firm name and style of T. E. Brown & Co., in a certain business of laying down pavements, and in such business had accumulated large assets of great value, the

* See order of leave to amend, by inserting name of additional executor, *post* page 32.

property of said firm. That the said Jarvis Langdon departed this life on the 6th day of August, 1870, at Elmira, New York, leaving a certain will, which was admitted to probate on the 12th of August, 1870, whereby these complainants were appointed his executors, and that complainants received authority from the surrogate of the county of Chemung, New York, to act in said behalf.

3 That your orators being authorized so to do by the terms of said will did afterward, to-wit: on the 25th day of April, 1871, enter into a certain contract and agreement in writing, whereby they sold and transferred to said Talmadge E. Brown, respondent, all the right, title, and interest of said Jarvis Langdon, deceased, in and to the undivided property or assets of the said late firm of T. E. Brown & Co., of Memphis, Tenn., subject, however, to all taxes and assessments thereon, then and thereafter to be made, and to all indebtedness therefor, and to all liabilities of said firm, or any of the members thereof, for transactions in the business of the firm in trade or contract, and subject to all judgments against the said firm, or any member thereof, recovered or to be recovered, and all costs, disbursements, officers and counsel fees and all liability for contribution to any other partner or person in consideration of moneys paid or to be paid on any liability of, from and against all of which real and possible liabilities, and of, from and against any other liability growing out of the transactions of said firm, said

4 Brown agreeing to fully indemnify and save harmless the executors, heirs, and next of kin of said Langdon, deceased, and upon the further obligation of said Brown to pay and discharge any just and legal claim of any person or persons whomsoever, for any share of the profits or proceeds of the business of said firm, and whether said claim was against the said firm, or against the said Langdon, deceased, individually, and to fully indemnify and save armless, the executors, heirs, and next of kin of said Langdon, of, from, and against any such claim. All the aforesaid agreements of indemnity to apply not only to liability growing out of the transactions of said firm, but also of any possible liability growing out of the transactions of any member of said firm, and in consideration of the assignment of said interest by the said executors, the said respondent, Talmadge E. Brown, agreed to pay the sum of twenty-five thousand dollars in cash, and the further sum

5 of fifty thousand dollars in notes satisfactorily endorsed, and also the further sum of twenty-five thousand dollars in five years from said date, and said Talmadge E. Brown and Anna L. Brown, respondents, it was stipulated in said agreement, should convey to said executors for the security of said last named twenty-five thousand dollars, by good and sufficient warranty deed, a certain tract of land within the corporate limits of the city of Des Moines, consisting of 130 acres, and also a certain plantation situated on White River, in the State of Arkansas, consisting of 1,600 acres of land, with the further agreement that the said Brown would purchase back, five years from the date of said contract, if the estate should desire it, all of the lands for twenty-five thousand dollars, paying that sum in cash. It was further agreed that the said Brown should convey said land to the executors of Langdon, deceased, and should exhibit an abstract showing the title thereof to be perfect, and free and clear of all incumbrances, and it was further

agreed that upon the full performance of said contract by said Brown, the said executors should surrender to said Brown his promissory notes held by said estate, amounting to some $17,000.00.

6 Your orators further show that in pursuance of said agreement the said Brown paid the said first sum of twenty-five thousand dollars and delivered his notes for the sum of fifty thousand dollars, endorsed to the satisfaction of said executors, and that he delivered to the said executors a warranty deed dated on the 18th day of May, 1871, signed by himself and his said wife, conveying the following described premises, situated in the county of Polk, and State of Iowa, to-wit:

Lots Nos. 1 and 2, in section 8, and so much of the ne. ¼ of ne. ¼ of said section 8 as lies south of Mulberry street in the city of Des Moines: also so much of lot No. 3, in said section 8, as lies south of said Mulberry street: also a strip of land 13½ rods wide off the west side of the sw. ¼ of the nw. ¼ of section 9: also a strip of land 13½ rods wide lying south of said Mulberry street on the west side of the nw. ¼ of the nw. ¼ of said section 9: also all that portion of land lying west of Iowa street, and north of the south line of what was formerly

7 known as Mulberry street, in said city of Des Moines, and bounded on the west by Coon river and on the north by the right of way of the Des Moines Valley Railroad, except so much thereof as was deeded by said Brown, July 11, 1870, to the city of Des Moines for the purposes of a street, all being in township No. 78 north, range No. 24 west 5th P. M., and situated within the corporate limits of the city of Des Moines, Iowa, and containing in all 130 acres, more or less.

It is further declared in said deed that it is intended by the same to convey to said Charles J. Langdon all the real estate owned by said Brown in said sections 8 and 9 lying south of the right of way limits of the Des Moines Valley Railroad. Your orators show that for convenience, and at the request and instance of said executors, said deed was made to one of their number, to-wit: Charles J. Langdon.

8 Your orators further show that in pursuance of said agreement with the said Brown, and in consideration of the delivery of said deed your orators leased to the said Brown the use of the real estate in said deed described, for the term of five years, in consideration that said Brown would pay the taxes and assessments thereon. Your orators further show and aver that on the third day of August, 1871, they entered into a certain supplemental agreement with said Talmadge E. Brown, respondent, whereby it was provided that said Brown need not perfect his conveyance to said plantation on White river, in Arkansas, as he was required to do by said contract with the said executors, dated April 25, 1871, but that in lieu of said transfer he should assign a certain judgment owned by him against the county of Buena Vista, in the State of Iowa, on which it was recited there was due $5000,

9 and that said Brown guaranteed the collection of the same; and it was further agreed in said supplemental agreement that if said executors desired it, said Brown should, at the expiration of the five years stated in said contract of April 25, 1871, repurchase the 130 acres of land in the city of Des Moines at $25,000, the same as though the plantation aforesaid was included therein; and it was further agreed that if any of said Buena Vista county judgment should, within said five years,

be paid to said executors they were to allow interest thereon at the rate of seven per cent per annum, and the amount so paid shall be deducted from the twenty-five thousand dollars to be paid by said Brown as the repurchase money of the Des Moines property.

10 Your orators further show that said Brown, in pursuance of said last named agreement, assigned to your orators the said judgment against the county of Buena Vista, and further that he collected thereon and remitted to your orators, on or about the 12th day of July, 1872, the sum of $1,279.70.

Your orators further show that said five years, at the end of which Brown undertook and agreed to repurchase said land for the sum of twenty-five thousand dollars, expired on the 25th day of April, 1876. That on the 25th day of October, 1875, your orators notified said Talmadge E. Brown that they would desire and elect to take the said $25,000 and to reconvey to him the said real estate in pursuance of said agreement. That the said T. E. Brown, on the 26th day of May, 1876, acknowledged the receipt of said communication and stated that he should not be able to pay the money during the present year but asked for an extension of time for the payment of the same.

11 Your orators further show that since said correspondence, to-wit: on the 18th day of July, 1876, your orators caused to be made to the said T. E. Brown a formal tender of a reconveyance of said real estate and a re-assignment of the said judgment, and demanded of him payment of the said sum of $25,000, less a credit of $1,282.90 as of date June 19, 1876, and demanded of him as due of that date the sum of $23,381.14.

Your orators further show that on the 17th day of July, 1876, your orators made a further demand of said sum, and a like tender of said reconveyance of said land and an assignment of said judgment, but the said Brown has wholly refused and neglected to pay said money or any part thereof.

Your orators show that by reason of the premises there has become due your orators upon said contract the said sum of $23,381.14, with six per cent interest thereon since the 19th of June, 1876, and that your orators have for security for the payment of said sum an equitable lien upon the said real estate described in the conveyance made to Charles J. Langdon in trust for your orators herein before set forth and described.

12 Wherefore your orators pray that the right and equity of the said respondents, Talmadge E. Brown and Anna L. Brown, in and to said real estate be barred and foreclosed by the sale of said premises for the satisfaction of the amount due to your orators upon the said contract of the 25th of April, 1871, and the contract supplemental thereto and that your orators have a decree for the said sum of $23,381.14 and interest as above set forth, and an order for the sale of said premises by a master of this Court for the satisfaction thereof and costs in this behalf expended, and that if the sale of said premises shall fail to satisfy said decree that your orators have a right to a general execution for the amount remaining unsatisfied, and for such other, further and full relief as in equity and good conscience your orator is entitled to receive; and that the subpœna of this Court be issued to the said Tal-

madge E. Brown and Anna L. Brown, and that they be required to answer the allegations of this bill.

(Signed) NOURSE & KAUFFMAN,
13 *Sols. for Complainants.*

(Endorsed:) No. 736. Equity. U. S. C. C. John D. F. Slee et al., executors of Jarvis Langdon, dec'd, vs. T. E. Brown et ux. Bill in Equity.
Filed July 19, 1876.

E. R. MASON, *Clerk.*

On the same day, to-wit: July 19, 1876, there was issued from said clerk's office in said cause, a subpœna in chancery to said defendants, which said subpœna is in words and figures following, to-wit:

SUBPŒNA IN CHANCERY.

UNITED STATES OF AMERICA, } ss.
DISTRICT OF IOWA. }

The President of the United States to Talmadge E. Brown and Anna L. Brown, his wife:
14

We command you and each of you, that you appear before the Judge of the Circuit Court of the United States, for the district of Iowa, at Des Moines, on the first Monday of September, it being the 4th day of September next, A. D. 187 , to answer to the bill of complaint of John D. F. Slee, Charles J. Langdon, Theodore W. Crane and Samuel S. Clemens, executors of Jarvis Langdon, dec'd, this day filed in the office of the clerk of said Court, and then and there to receive and abide by said judgment and decree as shall then and thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the district of Iowa: Returnable to the September rule day, it being Monday the 14th day of September, A. D. 1876.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the U. S., at Des Moines, this, the 19th day of July, A. D. 1876, and of the Independence, the 101st year.

(SEAL)
(Signed) ED. R. MASON,
15 *Clerk U. S. C. C., District of Iowa.*

Memorandum. The within named defendants are notified that unless they enter their appearance in the clerk's office of said Court, at Des Moines aforesaid, on or before the day to which the above writ is returnable, as above stated, the complaint will be taken against them as confessed, and a decree entered thereon accordingly.

(SEAL)
(Signed) ED. R. MASON,
Clerk U. S. C. C., District of Iowa.

And afterward, to-wit: on the 20th day of July, 1876, said subpœ-

na was returned into said clerk's office by the marshal and filed in said cause, with the following return of service endorsed thereon, to-wit:

No. 736. *Subpœna in Chancery.*

16 Circuit Court of the United States, District of Iowa.

JOHN D. F. SLEE ET AL., ex'rs of JARVIS LANGDON,
vs.
TALMADGE E. BROWN ET UX.

Returnable to Rule day, first Monday in September, A. D. 1876.

ED. R. MASON, *Clerk.*

Filed July 20, A. D. 1876.

ED. R. MASON, *Clerk.*

NOURSE & KAUFFMAN,
Compl'ts Sols.

This writ came into my hands for service on the 19th day of July, A. D. 1876, and I served the same on the within named Talmadge E. Brown and Anna L. Brown, his wife, on the twentieth day of July, 1876, by delivering a true copy of the same to each, at Des Moines, in the county of Polk, and State of Iowa.

J. W. CHAPMAN,
U. S. Marshal.

17

R. V. ANKENY,
Deputy.

Marshal's fees:

Mileage, 2 miles	$ 12
Service on 2	4 00
Copy, 2	2 00
	$6 12

Afterward, to-wit: on the 4th day of September, A. D. 1876, the said respondents, by C. C. Cole and J. M. St. John, their solicitors, filed their appearance in said cause; which said appearance is in the words and figures following, to-wit:

18 In United States Circuit Court, District of Iowa.

JNO. D. F. SLEE ET AL., plaintiffs,
vs.
T. E. BROWN ET UX., defendants.
} Præcipe for appearance.

The clerk of said court will please enter our appearance for all. Defendants in above cause.

(Signed) J. M. ST. JOHN, *Sol'r,*
C. C. COLE, *Cons'l,*
Solicitors for said defendants.

Filed September 4, 1876.

E. R. MASON, *Clerk.*

On the same day, to-wit: the said respondent, Anna L. Brown, by her said solicitor, filed in said clerk's office her separate answer, which said answer is in words and figures following, to-wit:

In the Circuit Court of the United States, District of Iowa.

JOHN D. F. SLEE, CHARLES J. LANGDON, THEODORE W. CRANE, and SAMUEL L. CLEMENS, executors of JARVIS LANGDON, deceased,
vs.
TALMADGE E. BROWN, and ANNA L. BROWN, his wife.
} Answer.

19

The separate answer of Anna L. Brown, one of the defendants to the bill of complaint of John D. F. Slee, Charles J. Langdon, Theodore W. Crane, and Samuel L. Clemens, executors of Jarvis Langdon, deceased.

This defendant now, at all times hereafter, saving and reserving to herself all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainants' said bill of complaint contained, for answer thereunto, or unto so much, and to such parts thereof, as this defendant is advised, is material for her to make answer unto. She answers and says:

That she has no knowledge or information sufficient to form a belief as to the correctness of the averments of the said complainant's bill, except as the same are set forth in the answer of her husband and co-defendant Talmadge E. Brown, filed herein, and she therefore denies the said allegations, except as the same are admitted in the answer
20 of her said husband, and calls for full proof thereof, by the complainants. She further states that she has no interest in this controversy, except such as may arise to her by reason of being the wife of her co-defendant, Talmadge E. Brown, and having fully answered, your respondent asks to be dismissed with her costs.

(Signed) J. M. ST. JOHN,
Solicitor for Respondent.

(Signed) C. C. COLE, *of Counsel.*

(Endorsed:) In U. S. Circuit Court, District of Iowa. John D. F. Slee, Charles J. Langdon, Theodore W. Crane, and Samuel L. Clemens, executors of Jarvis Langdon, deceased, vs. Talmadge E. Brown and Anna L. Brown, his wife. Separate answer of Anna L. Brown.
J. M. ST. JOHN, of Des Moines,
21 *Solicitor for Respondent.*
C. C. COLE, of Des Moines,
Of Counsel.
Filed Sept. 4, 1876.
E. R. MASON, *Clerk.*

On the same day, to-wit: T. E. Brown, one of the respondents, by his said solicitors, filed in said cause, in said clerk's office, his separate answer, which is in the words and figures, to-wit:

In the Circuit Court of the United States, District of Iowa.

JOHN D. F. SLEE, CHARLES J. LANGDON, THEODORE W. CRANE, and SAMUEL L. CLEMENS, executors of JARVIS LANGDON, deceased,
vs.
TALMADGE E. BROWN, and ANNA L. BROWN, his wife.
} Answer.

22 The separate answer of Talmadge E. Brown, one of the defendants to the bill of complaint of John D. F. Slee, Charles J. Langdon, Theodore W. Crane and Samuel L. Clemens, executors of Jarvis Langdon, deceased.

This defendant, now, and at all times hereafter, saving and reserving to himself all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainants' said bill, contained, for answer thereunto, or unto so much and to such parts thereof, as this defendant is advised is material for him to make answer unto, he answers and says:

That he admits that the said complainants are citizens of the State of New York, and residents therein, except the complainant Samuel L. Clemens, who this respondent, from knowledge and information, charges to be a citizen of the State of Connecticut, and not a citizen of the State of New York.

23 He admits that the defendants in said bill, to-wit: This respondent, Talmadge E. Brown, and Anna L. Brown, are citizens of the State of Iowa, and residents of the city of Des Moines, in said State; and he avers that the said Anna L. Brown, is the wife of this respondent, and has no other interest in the matter in controversy than as his wife.

This respondent admits that prior to the 6th day of August, 1870, Jarvis Langdon and this respondent were associated together in the firm name and style of T. E. Brown & Co., in a certain business of laying down pavements, and in such business had accumulated assets of considerable value, the property of said firm.

This respondent admits that the said Jarvis Langdon departed this life on or about the 6th day of August, 1870, at Elmira, New York, and that he left a will wherein he appointed the complainants and another his executors; but this respondent denies that the complainants are qualified as executors in such manner as to enable them to maintain this action; and he avers, in response to the allegations of the complainants in this respect, that they are not entitled to maintain this action by reason of being executors of the estate of J. Langdon, deceased.

24 This respondent admits that the complainants and one Olivia L. Langdon, being authorized thereto, did, on the 25th day of April, 1871, enter into a certain contract and agreement in writing, whereby they sold and transferred to this respondent certain rights and interests of the said decedent, Jarvis Langdon, deceased, in and to the partnership, effects and property of the firm of T. E. Brown & Co., substantially upon the terms as stated in the complainants' said bill, except that in consideration of such transfer, the said Brown agreed to pay and did pay the sum of twenty-[illegible] dollars in cash, and the further

sum of fifty thousand dollars in notes satisfactorily endorsed, and also conveyed, his wife joining therein, a certain tract of land containing one hundred and thirty acres situated within the limits of the corporation of the city of Des Moines, Iowa; and also did agree to convey a certain plantation situated on White River in Arkansas, consisting of sixteen hundred acres of land, and all the buildings, improvements and appurtenances belonging thereto. And this respondent
25 did also further agree that in five years from the date of such contract he would, if the said estate or its legal assigns so desired, purchase back said lands for twenty-five thousand dollars, paying that sum in cash. A copy of said agreement is annexed to the cross-bill by this respondent against these complainants and another filed herewith and is marked Exhibit "B," and the same is here referred to and made a part of this answer.

This respondent denies distinctly and absolutely that he agreed to pay, in addition to said twenty-five thousand dollars in cash and fifty thousand dollars in notes satisfactorily endorsed, a further sum of twenty-five thousand dollars in five years from said date.

26 This respondent distinctly and absolutely denies that it was stipulated in said agreement, or otherwise, that this respondent and his wife, Anna L. Brown, should convey to said executors for the security of said last named twenty-five thousand dollars, the tract of land described in the complainants' said bill, or any part thereof.

This respondent admits and avers that said land was conveyed to said complainants absolutely and in full payment of the balance due for the interest of the estate of J. Langdon, deceased, had in the property of said firm; and he denies that there was any agreement or understanding of any kind in any way, that the same was conveyed to said complainants in security for the payment of any sum.

But this respondent admits that he did agree that in five years from the date of said contract he would, if the estate or its legal assigns so desired, purchase back said lands for twenty-five thousand dollars, paying that sum in cash.

27 This respondent admits that it was further agreed that this respondent should convey said lands to the executors of said Langdon, deceased, in fee simple absolute, free and clear of all taxes, assessments, or any incumbrance of whatsoever nature, and that he would furnish an abstract of title, showing the title to be perfect.

This respondent admits that at the time of the making of said contract, the said executors held the promissory notes of this respondent to the amount of about seventeen thousand dollars, which notes by said agreement, they were to, and did, surrender to this respondent, the same being included in the purchase, and a part of the consideration for which the price was paid by your respondent.

This respondent avers that there was no other or different agreement between the parties than that embodied in the contract, a copy of which is referred to above and made a part of this answer; and he denies specifically every averment in the bill inconsistent with, or varying at all from, said written agreement.

28 This respondent admits and avers that on the 25th day of June, 1871, both parties performed said contract in full, to-wit:

The said Brown paid the twenty-five thousand dollars in cash, and fifty thousand dollars in endorsed notes and delivered deeds to the real estate in both Iowa and Arkansas. The said executors delivered their assignment of the interest of said estate in the assets of the firm of T. E. Brown & Co. and a release of all claims for advances or loans by J. Langdon to said firm, and surrendered the notes of said Brown, a memorandum of which performance was endorsed in writing upon said contract, signed by the parties, a copy thereof is annexed to the cross-bill of this respondent against the complainants' filed herewith, marked Exhibit "F," and the same is made a part of this answer. The deed made by this respondent to the lands in Iowa, was also signed by his wife and was probably dated on the 18th day of May, 1871, as stated in said bill of complaint, and that the deed to the Arkansas land was also made and delivered at same time.

29 This respondent admits that the deed was at the instance of said executors made to Charles J. Langdon.

This respondent further answering, denies that there was at that time any agreement whatever between the parties for any lease of the land to this respondent for any price, or for any time. He denies that in pursuance of any agreement, or in consideration of the delivery of said deed, the said complainants then leased said land to this respondent.

But this respondent avers that subsequent to the making of said contract or agreement of purchase by this respondent of the said complainants, which agreement was made on the 25th day of April, 1871, and subsequent to the performance as above specified and noted on said agreement, and on, to-wit: the third day of July, 1871, this respondent did lease from said complainants the said lands, situ-

30 ated in Des Moines and also that in the state of Arkansas, and agreed to pay for the use thereof for five years from that date, the taxes that should be levied thereon, and also to keep said premises in repairs during said term; and in said lease these complainants reserved the right to sell said premises, or any part thereof, during the term, and to give possession thereof to the purchaser; and it was agreed that such sale should terminate the lease as regards the premises sold, a copy of which lease is annexed hereto, and is made a part hereof and is marked Exhibit "No. 1." The said Langdon also then gave said Brown the same lease for the said Arkansas lands.

This respondent for further answer admits that on the 3d day of August, 1871, this respondent and the complainants did enter into a supplemental agreement whereby, in effect, a certain judgment then held by this respondent against Buena Vista county, Iowa, for the sum of five thousand dollars, should be transferred and the payment guaranteed by this respondent to the complainants in lieu of said lands in Arkansas. That upon the making of said modified and sup-

31 plemental contract the deed of the said Arkansas lands was canceled and surrendered said Brown in lieu thereof, the assignment of said judgment taken, the said contract being substantially as stated in complainants' bill; but for greater certainty as to said supplemental agreement, a copy thereof is annexed to this answer as a part of the same, and is marked Exhibit "No. 2."

This respondent admits that in pursuance of said last named agreement an assignment and guaranty of said judgment was made, and the amount stated as collected thereon was collected and forwarded to said complainants, to-wit: the sum of twelve hundred and eighty-two dollars and ninety cents, on the 12th day of July, 1872.

32 Your respondent for further answer admits that the five years, at the expiration of which he agreed to purchase back said land for twenty-five thousand dollars, terminated and expired on the 25th day of April, 1876; but he denies that by letter, or otherwise, the said Charles J. Langdon or the said complainants, or any one for them, then notified this respondent in any way whatever of a desire that he should purchase back the lands, nor was any conveyance tendered, or any demand made at that time, or for months thereafter.

He denies that on the 25th day of October, 1875, said Charles J. Langdon, or the complainants, notified this respondent that they desired and elected to take said twenty-five thousand dollars, and to reconvey to him said real estate; and he also denies their right to make any such notice at that time, or at any other time than on the 25th day of April, 1876, the date at which, by his agreement, he was to purchase back the land.

33 He denies that he ever received any communication from the complainants, or either of them, dated October 25, 1875, but he admits that he did receive a letter from said Langdon, dated October 30, 1875, in which he stated the time of his intended departure for Europe and that he had left with Mr. Slee all necessary papers for completing the stiputation of re-sale to this respondent on the 25th of April, 1876, *as per contract.* And this respondent avers that no papers were presented to him, nor was he ever informed of the desire of said estate that he should purchase back said land until after the expiration of the time fixed in said contract for such purchase, nor until the time of the alleged tender of deeds, as herein stated, in July, 1876.

And this respondent further avers that he did receive from said Langdon another letter, of May 24th, 1876, and admits that thereafter, to-wit: May 26th, 1876, he did write a letter to said complainants in which he intended to make to the said executors a new and original proposition to purchase back said land on such time as would admit of some amicable adjustment between him and the said executors

34 of a claim held by him against them, and which claim was not then, as this respondent thought, in a condition for use in making such payment. Said letter expressed both an inability and an unwillingness to repurchase said land upon the terms specified in contract of April 25th, 1871. He denies that he asked for an extension of time on the former contract.

Your respondent admits that on or about the 18th day of July, 1876, some person claiming to act for the complainants, made a formal tender of a re-conveyance of said real estate, and re-assignment of the judgment against Buena Vista county, and demanded the payment of twenty-three thousand three hundred and eighty-one dollars and fourteen cents; but this respondent avers that said tender was not made in accordance with said contract, nor was he bound to accept the same; and he denies the sufficiency of said deed, and also denies the right of

the complainants to then make such tender, or to demand payment from him at that time upon said contract.

35 He denies any further tender of any deed for said premises, as stated in said complainants' bill.

Your respondent denies that by reason of the premises there has become due the complainants upon said contract, or upon any contract with this respondent, the sum of twenty-three thousand three hundred and eighty-one dollars and fourteen cents with interest thereon from the 19th day of June, 1876, or any other amount, or from any other date, and he denies that said complainants have for security for the payment of said sum an equitable lien upon the real estate described in the conveyance to said Charles J. Langdon, by this respondent.

This respondent denies that said complainants have any claim against him by reason of said contracts, or by reason of any other matter.

And having fully answered, your respondent asks to be dismissed with his costs.

(Signed) J. M. ST. JOHN,

36 *Solicitor for Respondent.*

(Signed) C. C. COLE, *of Counsel.*

UNITED STATES OF AMERICA, } ss.
DISTRICT OF IOWA. }

I, Talmadge E. Brown, the respondent in the foregoing answer, being first duly sworn, do state on oath that I am one of the defendants in the said bill in chancery, and that the statements of the foregoing answer, so far as they are made upon my knowledge, are true, and so far as they are made upon my information and belief, I believe them to be true.

(Signed) T. E. BROWN.

Subscribed and sworn to before me this 29th day of July, 1876.

(Signed) ED. R. MASON,

37 *Clerk U. S. Circuit Court.*

"Exhibit No. 1."

Memorandum of lease made and concluded this 3d day of July, 1871, by and between C. J. Langdon, of the city of Elmira, New York, of the first part, and T. E. Brown, of Polk county, Iowa, party of the second part.

Witnesseth, that said Langdon hereby leases to said Brown the following described premises situated in the county of Polk, state of Iowa, particularly described in a deed from T. E. Brown and wife to said Langdon, bearing date the 18th day of May, 1871, being all the lands described in said deed for the term of five years from the date hereof.

38 Said Brown hereby hires said premises and agrees to pay for the use thereof all the taxes that shall be levied and assessed thereon during said term, and further agrees to keep said premises in good repair during said term. The party of the first part reserves the right to sell said premises or any part thereof during the term above specified, and

to give possession thereof to the purchaser, and it is agreed that such sale shall terminate this lease as regards the premises sold.

In witness whereof, said parties have hereunto set their hands the date first above written.

(Signed) C. J. LANGDON,
T. E. BROWN.

39 "Exhibit No. 2."

It is hereby mutually agreed by and between Talmadge E. Brown and J. D. F. Slee and others, executors of the estate of Jarvis Langdon, deceased, that said Brown need not perfect his conveyance to the plantation on White River, in Arkansas, as he is required to do by contract with said executors, dated April 25, 1871, but may, in lieu thereof, transfer and assign to said executors a certain judgment now owned by him against the county of Buena Vista, State of Iowa, on which there is due to him five thousand ($5000) dollars, for the purposes named in said contract of April 25, 1871, said Brown to guarantee the collection of said judgment.

It is further understood and agreed that if said executors desire it, said Brown shall, at the expiration of the five (5) years stated in said contract of April 25, 1871, repurchase the 130 acres of land in the city of Des Moines at $25,000, the same as though the plantation aforesaid was included therein.

40 And it is further understood that if any of said Buena Vista judgment shall within said five (5) years be paid to said executors, they will allow interest thereon at the rate of seven (7) per cent per annum, and the principal so paid may be deducted from the $25,000 to be paid by said Brown for the repurchase of the Des Moines property.

In witness whereof, said parties have hereunto set their hands this 30th day of August, 1871.

(Signed) J. D. F. SLEE, *Executor, and attorney for the executors of the estate of J. Langdon, deceased.*
TALMADGE E. BROWN.

Endorsed:

In United States Circuit Court, District of Iowa.

JOHN D. F. SLEE, CHARLES J. LANGDON, THEODORE W. CRANE and SAMUEL L. CLEMENS, ex'rs of JARVIS LANGDON, deceased,

vs.

TALMADGE E. BROWN and ANNA L. BROWN, his wife.

Separate answer of Talmadge E. Brown.

J. M. ST. JOHN, of Des Moines,
41 *Solicitor for Respondent.*

C. C. COLE, of Des Moines,
Of Counsel.

Filed Sept. 4, 1876.

E. R. MASON, *Clerk.*

Afterward, on the 30th day of September, 1876, the said complainants, by their said solicitors, filed in said clerk's office a general replication, which said replication is in words and figures following, to-wit:

In the Circuit Court of the United States, District of Iowa.

JOHN D. F. SLEE, CHARLES J. LANGDON, THEODORE W. CRANE and SAMUEL L. CLEMENS, ex'rs of JARVIS LANGDON, deceased, *vs.* TALMADGE E. BROWN and ANNA L. BROWN, his wife.	No.——— Equity. General replication.

42 This repliant, saving and reserving to himself all, and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, saith: that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied to by this repliant; without this, that any other matter or thing whatever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver and prove, as this honorable court shall direct; and humbly prays, as in and by his said bill he hath already prayed.

(Signed) NOURSE & KAUFFMAN,
Solicitors for Complainants.

(Endorsed:) John D. F. Slee, Chas. J. Langdon, Theodore W. Crane and Samuel L. Clemens, executors of Jarvis Langdon, deceased, vs. Talmadge E. Brown, Anna L. Brown. General replication.
Filed Sept. 30, 1876.

E. R. MASON, *Clerk.*

43 NOURSE & KAUFFMAN,
Solicitors for Complainant.

On the 4th day of September, 1876, there was entered of record in said cause the following entry, to-wit:

In the United States Circuit Court, District of Iowa.

JOHN D. F. SLEE ET AL., executors of the estate of JARVIS LANGDON, dec'd, *vs.* TALMADGE E. BROWN and ANNA L. BROWN.

It is ordered that the defendant, T. E. Brown, have leave to file a cross-bill herein, and that process issue thereon. Dated this 4th day of September, 1876.

(Signed) J. M. LOVE, *Judge.*

(Endorsed:) No. 736. United States Circuit Court, District of Iowa. John D. F. Slee et al. vs. Talmadge E. Brown. Leave to file Cross-Bill.

Filed September 4, 1876. E. R. MASON, *Clerk.*

44 On the same day, to-wit: T. E. Brown, by his said solicitors, filed in said clerk's office his cross-bill against said complainants, which said cross-bill is in the words and figures following, to-wit:

In the United States Circuit Court, District of Iowa.

JOHN D. F. SLEE ET AL., executors of JARVIS LANGDON, deceased,
vs.
TALMADGE E. BROWN and ANNA L. BROWN; } Bill.

and

TALMADGE E. BROWN,
vs.
JOHN D. F. SLEE ET AL., executors of JARVIS LANGDON, deceased. } Cross-Bill.

Now comes the said Talmadge E. Brown, having fully answered each and every allegation in the said complainants' bill of complaint contained, and files this his cross-bill herein, in words and figures following, to-wit:

45 Your orator, Talmadge E. Brown, says that in December, 1867, the said Langdon was endorser for one John S. Baldwin on a large amount of commercial paper, and had paid and was liable to pay for him nearly one hundred thousand dollars, and for the firm of Sampson & Ballard, and others connected with the said Baldwin in business, said Langdon had also endorsed and became liable for large sums. That each and all of said parties, for whom said Langdon had paid, or was liable to pay, said amount as endorser aforesaid, became embarrassed in business, about December, 1867, and the said Langdon was in great danger of losing on account of said endorsements, he having no security except said Baldwin's interest in certain paving contracts in and for the city of Memphis, Tennessee, which had been transferred to said Langdon by said Baldwin to save him, the said Langdon harmless on account of said endorsements. That in this crisis of affairs, and at the urgent solicitations of said Langdon, a co-partnership was formed between said Langdon and Brown, under the firm name of T. E. Brown & Co., very soon thereafter, for the purpose of buying out the several in-

46 terests of all the other partners associated with the said Baldwin in the said paving contracts, and carry forward the same to completion and thereby securing said Langdon against loss on account of his endorsement, and the further object of making large profits out of the work aforesaid. That by virtue of the agreement between Langdon and Brown, Langdon was to furnish all needful capital except what Baldwin was to furnish, and Brown to take charge of the business and the

profits to be divided into thirds, one-third to Langdon, one-third to Brown, and one-third to Baldwin and others associated with him in business, in case that said Baldwin should keep a certain amount of capital in the business. That afterward, Baldwin having failed to keep the required amount of capital, or any capital in the business, and thereby having forfeited his interest, as claimed by both Langdon and Brown, it was
47 agreed between Langdon and Brown that they should share the profits and losses of the paving business equally, share and share alike. That the co partnership so formed bought all of the interest of the several paving firms and entered upon the work of paving the city of Memphis, and did acquire very large credits and just claims on said city for said work. That at Elmira, in the State of New York, about the 7th day of March, 1868, said Jarvis Langdon did make out and mail to the said T. E. Brown & Co., at Memphis, his certain account against the said Baldwin for the sum of eleven thousand two hundred and nineteen dollars and sixty-one cents; and that about the 16th day of April, 1868, did make out and mail to said firm his certain further account against Baldwin for a sum total of eighty-eight thousand five hundred and fifty-five and sixty six one-hundreth dollars, including the said former account. And that on or about the 21st day of May, 1868, did make out against Baldwin, and mail to said firm at Memphis, his certain further account, showing a balance then due said Langdon from said Baldwin of seventy-six thousand three hundred and
48 thirty-two and eighty-three hundredth dollars, over and above the said first account of eleven thousand two hundred and nineteen and sixty-one hundredth dollars, making a total due Langdon from Baldwin of eighty-seven thousand five hundred and fifty-two and forty-four hundredth dollars, after taking out the credits thereon shown; copies of which exhibits are hereto attached as exhibits "A," "B" and "C," and made a part of this cross-bill. That Langdon forwarded the same to the firm of Brown & Co., at Memphis, and requested them to charge the same to the said Baldwin, and credit the same to said Langdon on their said firm books, the said Langdon then and there promising and agreeing with Brown & Co. that Baldwin should deliver at Memphis sufficient lumber at twenty dollars per thousand feet, suitable for paving and in time for their said contracts to make good the said Baldwin's account with the balance to his, Baldwin's, credit then on the books of Brown & Co. That Brown & Co. did receive all of said several accounts by due course of mail, and relying upon the promises of the said Langdon, made as aforesaid, did credit said accounts to said Langdon and charge the same to Baldwin, whereby Langdon was paid by the firm eighty-seven thousand five hundred and fifty-two and sixty-one
49 one-hundredth dollars. That said charges and credits were asked for by said Langdon, upon the ground as stated by him, that it would enable him to collect his claims against Baldwin. That before making said entries there was, as appeared from the books of said Brown & Co., a balance due Baldwin of about twenty-five thousand dollars, and that in pursuance of the agreement between Langdon and the firm, Baldwin did, about the 16th day of May, 1868, deliver Brown & Co., as per agreement, about four hundred and seventy-nine thousand four hundred and thirty-seven feet of lumber, at twenty dollars per

thousand feet, and received the proper credit then and there of nine thousand five hundred and eighty-eight and seventy-four one-hundredth dollars. That afterwards, and about the month of June, 1868, Baldwin, under the said contract, delivered Brown & Co. about five hunddred and fifty-one thousand three hundred and fifteen feet of lumber at twenty dollars per thousand feet, and was by the firm credited the just sum of eleven thousand and twenty-six and thirty one-hundredth
50 dollars. And that about July following Baldwin delivered Brown & Co., under said contract, six hundred and eighty-four thousand five hundred and fifteen (684,515) feet of lumber at twenty dollars per thousand feet, and received therefor the proper credit of thirteen thousand six hundred and ninety and thirty one-hundredths ($13,690.30) dollars. That Baldwin never did deliver the firm of Brown & Co. any more lumber, and never did pay any part of the balance of said account against him, save and except as appears in the detailed statement of the account of Brown & Co. against Baldwin, hereto attached by copy as exhibit "D," and made a part of this cross-bill, though said Baldwin has been repeatedly requested to pay the same. That there was due from Baldwin on said account the sum of twenty-five thousand and seventy-two ($25,072.85) and eighty-five one-hundredths dollars on the 17th day of March, 1869, since which Baldwin has never paid anything thereon. That the interest on the same from the 17th day of March, 1869, to the 1st day of August, 1876, is eleven thousand and ninety-three and sixty-four one-hundredths ($11,093.64) dol-
51 lars. And that there is further due the said firm on the account of the said Hungerford judgment seven thousand six hundred and thirty-four and twenty-nine one-hundredths ($7,634.29) dollars, making a total due on said account up to the first day of August, 1876, of forty-three thousand eight hundred and seventy-eight one-hundredths ($43,800.78) dollars, as will more fully appear from said account shown in exhibit "D" all of which is now justly due and unpaid from the said executors to your orator, by reason of the said guaranty of Jarvis Langdon, deceased, and the other allegations in this cross-bill contained.

Your orator shows how the Hungerford judgment became a proper charge against Baldwin to-wit: That against the lumber so credited up to Baldwin, on its way to Memphis and at Louisville, Kentucky, one Mr. Hungerford, a creditor of Baldwin, caused an attachment to be levied, as the property of Baldwin, and that by a judgment of a court of competent jurisdiction of the state of Kentucky, the said attachment was adjudged to be a lien on said lumber, and the said Brown & Co. adjudged to pay for the said Baldwin, and did pay for him there-
52 on the sums shown in said "Exhibit D," by virtue whereof said sums, with interest and costs, become and were proper charges against said Baldwin and in favor of T. E. Brown & Co., no part of which has ever been paid, but all of which, with six per cent interest per annum since its said payment is still unpaid and due upon said account, so that your orator says there is now due and unpaid principal and interest on the said Baldwin account, the payment of which was guaranteed to the firm of Brown & Co. by the said Langdon, in the manner and at the time aforesaid, the sum of forty-three thousand eight hundred and 78-100 ($43,800.78) dollars, with six per cent interest thereon from

and after the first day of August, 1876. That Langdon deceased in the year 1870, and that on or about the 25th day of April, 1871, said T. E. Brown the then survivor of the firm, for a good and legal consideration purchased of the executors of said Langdon, deceased, all and singular the interest in the assets, credits and property that J. Langdon had in the firm of Brown & Co., of whatsoever kind, subject however to the firm debts, and also purchased all of said Langdon's claims for moneys loaned and capital advanced the firm, as will more fully appear by the contract of purchase, a copy of which is hereto

53 attached as "Exhibit E," and made a part hereof. That this consideration paid by the said Brown to the said executors for the said Langdon's interest, was a very large price for his interest in the said firm assets, which had, for the benefit of said Langdon been put in great jeopardy on account of his embarrassments from the said several endorsements which necessitated a borrowing by the firm for Langdon's benefit of two hundred and seventy-five thousand ($275,000) dollars, in Memphis City time bonds from the city of Memphis, on conditions that placed the whole firm in great peril, which bonds were sold at about fifty cents on the dollar in the fall of 1869, at forced sale for cash, and fifty-nine thousand ($59,000) dollars of the proceeds thereof paid over to said Langdon on account, and the balance paid upon said firm debts. This was done at the request and for the benefit of Langdon.

In this crisis in the firm affairs, the executors of said Langdon refused to put any more money into the said venture to carry forward the same to completion, as said Langdon had agreed with the said Brown to do, and the executors thus compelled the said Brown to buy out their said interests as aforesaid, or to lose all his interests in the said firm assets.

54 And so your orator says that he paid a full and just consideration for all of the said assets, including the said Baldwin account, guaranteed as aforesaid, and that your orator is justly entitled to the full payment of said Baldwin's account, from the executors of the estate of J. Langdon, deceased, with six per cent interest thereon from and after the first day of August, 1869.

Your orator further says that after closing the said contract, and about the 25th day of June, 1871, said contract was fully performed and receipted, as appears by Exhibit "F," a copy of the endorsement made on the contract and signed by the parties and is made a part of this cross bill. That the same day and year, and in pursuance of the said purchase, the executors did make and execute to said Brown an assignment of all of said firm assets including the said Baldwin account so guaranteed by the said Langdon in the words and figures set forth in Exhibit "G," which is also attached and made a part hereof by copy.

55 Your orator also alleges that ever since his connection with the said business of paving in Memphis, that said Baldwin has claimed an interest therein. That this claim has, since his failure to keep the required amount of capital invested in the business, been denied by your orator, by the said Langdon and by his executors; and that it is true, in fact, that said Baldwin forfeited all interest in the said busi-

ness, but that notwithstanding the same the said Baldwin and his creditors have constantly asserted the same and have repeatedly threatened your orator with litigation of a serious character, in case your orator sought to enforce payment of said account from said Baldwin. That a great number of vexatious suits growing out of said paving business, extending through a series of years, so burdened your orator that up to this time he has been deterred by said threat from Baldwin, from instituting any proceedings against said Baldwin for the collection of said account, hoping to get from him an acknowledgment of the amount due, and such release as would lead to an equitable adjustment of the whole matter with all parties.

56 And that your orator has not heretofore pressed the said executors by suit for payment of said account, because the said contract of purchase, a copy of which is attached as Exhibit "E," contains a clause indemnifying the said executors against the claim of Baldwin and others for profits and interest.

But your orator alleges that there is nothing whatever in the said Baldwin's claim, and that the said contract of indemnity to the said executors, constitutes no bar whatever, either in law or equity, to his right of recovery on said account from said executors on the guaranty aforesaid.

Your orator further says that his letter to C. J. Langdon, one of said executors, of date 26th May, 1876, referred to in complainants' bill, was, by him, intended to make the said executors a new and an original proposition to purchase the said land or repurchase the same, on such time as would admit of some amicable adjustment of the said account with Baldwin, and obtain from him a release to the estate of Langdon, placing your orator in the position whereby his said

57 account against Baldwin could not be questioned by the executors of Langdon, and the payment proposed on the said land be made out of the said Baldwin account. But your orator says that since his said proposition to purchase the real estate described in plaintiffs' bill was not accepted but rejected, and an issue forced by the bringing of this suit, he prays the judgment of this court, whether the said executors are not now liable to your orator in the full amount of the said Baldwin account, with interest thereon, as aforesaid, besides costs.

And your orator further alleges and shows to the court that Brown & Co. made up a statement of firm assets and liabilities, on or about the 17th day of March, 1869, showing that Baldwin then owed the firm twenty-five thousand seventy-two dollars and eighty-five cents ($25,072.85), and sent the same to said Langdon with a request that he, as guarantor of said account, would institute legal proceedings for its collection, which said Langdon failed and neglected to do.

58 That under date of about August, 1869, said Langdon wrote Brown submitting Hungerford's proposition for a settlement of that part of the Baldwin account arising out of the Hungerford attachment, in answer to which Brown, again alluding to Langdon's said guaranty, stated to Langdon: "I have written just as I think and feel. Now it is for you to conclude what will be best for *you* to do, and do it. I think you are the only interested party," etc., etc.

That Brown & Co., in April, 1869, sent Langdon another statement

of the firm assets, and liabilities, and another in May, another in July, another in August, another in November, and still another in December, all of that year, and in each of these statements the said Baldwin account made up a part of the firm assets, and the said Langdon's relation to the said account repeatedly pointed out with a request that the same be collected, or in some manner made good to the firm.

That your orator continued to send said Langdon almost monthly thereafter during his lifetime, statements in each of which the said balance against Baldwin appeared as an asset of the said firm, and repeated requests for its payment or adjustment were made of Langdon by the firm.

59 That after the death of said Langdon, said Brown, as survivor, fully advised said executors of said balance against Baldwin, including the Hungerford account, how the same arose, and of the decedents relation thereto,and that said Brown as survivor,should look to them for some adjustment of the matter. Brown also repeatedly requested that the executors bring suit on said claim against Baldwin in the courts of Chemung county, in the State of New York, where both the said executors and Baldwin then resided, and that to this end the executors were at liberty to use the name of said Brown in bringing said suit if they deemed the same more advisable, all of which the said Langdon and his said executors have failed and neglected to regard. And so your orator states and shows to this Honorable Court that he has been at all times diligent, and the said Langdon and his executors negligent of duty with reference to said account. And that said claim still justly subsists in his favor against the executors of the estate of said Langdon, and has been, both by said Langdon in his lifetime, and by his executors since said Langdon's death, acknowledged so to subsist.

60 He further states that all of the complainants in the original bill filed, are non-residents of the state of Iowa, and are the owners of the real estate described in said bill of complaint, and have no other property within the state of Iowa.

Therefore, and by reason of all the said several allegations in the cross-bill contained, your orator prays this honorable Court for the process of subpœna in chancery against the said John D. F. Slee, Charles J. Langdon, Theodore W. Crane, Olivia L. Langdon, and Samuel L. Clemens, and that said Olivia L. Langdon be made a party defendant to this cross-bill, and that they may be required to severally and fully answer the allegations hereof, and that your orator may have a decree herein against said executors for the sum of forty-three thousand eight hundred 78-100 (43,800.78-100) dollars, with six per cent interest thereon from and after the first day of August, 1876, besides costs, and that in case the said executors, who are complainants in the original bill herein, shall have a decree against the said Brown for any sum whatever,that the amount found to be due herein may be set off against

61 the same as far as shall be necessary; that the same be made a lien on the said real estate, with orders to have the same sold in payment of the decree, and that execution may issue for any balance that may remain unpaid, after subjecting the said real estate to the payment of said decree, and especially that the complainants in the said original bill filed herein, be required to answer the allegations of

this cross-bill before they be permitted to take any steps whatever in the further prosecution of their original bill, and for such further, other, or different relief as to this honorable Court may seem fit and proper to be made, and your orator will ever pray, etc.

(Signed) J. M. ST. JOHN,
Solicitor for Complainant in Cross-Bill.

(Signed) C. C. COLE, *of Counsel.*

62 Exhibit "A."

1868. J. S. Baldwin, Esq., to J. Langdon,

	For advances on lumber, as follows:		Dr.	
Jan. 23	Check sent to H. Mack		$1,000	
Feb. 1	Dft. on N. Y. sent to Warren		1,000	
" 14	" " " " " " Oil City		1,000	
				$3,000
	For expenses paid, as follows:			
Jan. 7	H. D. Crane's st. dft.,	$2004.09		
	Exchange on above, $5.00		$2,009.09	
Jan. 20	A. Langdon, st. dft., paid order J. C. Sampson to pay interest and expenses to Memphis		477.92	
Feb. 17	Disct. on paper at Watkins		88.00	
" "	J. C. Sampson's expenses to N. Y. and return		25.00	
" 19	Paid J. C. Sampson for disc't at Owego,		10.00	
" 26	" J. C. Sampson to pay on acc't note due at Owego	$2,500.00		
	Disc't on new note and stamp	46.45		
	Sundry charges	8.00	2,554.45	
Mch. 3	J. C. Sampson paid you cash		3,000.00	
				8,164.46

63 Total debit, $11,164.46

ELMIRA, March 7, 1868.

Received, eleven thousand one hundred and sixty-four 46-100 dollars, as per above statement. J. S. BALDWIN.

Mch. 7	Interest to date	$ 55.15
	Add principal amount above	11,164.46
	Total Dr. to be carried to Memphis book	$11,219.61

John S. Baldwin, in acc't with J. Langdon.

1868.			Time.	Interest.
			m. ds.	
Mch. 7	To am't due as per statement rendered	$11,219.61	1:09	$ 85.08
Feb. 17	To pd. your note due in N. Y. Oct. 19, '67, held by the 2d Nat'l, Elmira	$5,000.00		
	Protest	1.34		
	¼ pr. ct. exch'g	12.50	5,013.84	5:27 172.55

1868.			Time.	Interest.
Feb. 20	To pd. your note due in N. Y. Feb. 11.....$5,000.00			
64	To pd. your note due in N. Y. Feb. 11... 5,000,00			
	Protest..... 1.25		m. ds.	
	¼ pr. ct. ex. 10,000 25.00	$10,026.25	2:05	$126.71
" 26	To paid your note due Feb. 25.....$5,000.00			
	Int. to 25th, 7 mos. 207.08			
	¼ pr. ct. exchange.. 12.50	5,219.58	1:22	52.77
" 26	To pd. your note due Jan. 10 at 2d Nat'l Elmira..$5,000.00			
	Protest..... 1.22	5,001.22	3:06	33.04
Mch. 7	To gave Atwater to go after lumber on Alleghany river..	1,000.00	1:09	7.58
" 7	To pd. your note due 2d at 2d Nat'l Elmira....$5,000.00			
	Int. from Jan. 4 to date..... 265.38	5,265.38	1:09	39.92
" 9	To J. C. Sampson, for exch. on $2,500 note discounted at			
65	Owego for Baldwin to pay in part note of $5,000 due 29th	12.50	1:07	09
" 16	To pd. your note in N. Y. due March 13.....$5,000.00			
	3 3-30 mos. interest 90.38			
	¼ pr. ct. exchange.. 12.50	5,102.88	1:03	32.73
" 23	To pd. your note due 19th, N. Y.....$2,500.00			
	Protest..... 1.62			
	¼ pr. ct. exchange.. 6.25	2,507.87	:28	13.65
" 30	To paid tel. to N. Y. about your note.....	75		
April 3	To pd. your note at Mts. Bank, N. Y., due April 2d $4,307.47			
	Interest to date.... 77.88			
	¼ pr. ct. exchange.. 10.76	4,396.11	:14	11.96
		$54,756.99		$576.39

66 Exhibit "B."

	Forward.....			
	No. 2.....			
	To amount brought forward..	$54,765.00		$576.39
April 7	To paid your note due in N. Y. Mar. 28.....$3,279.98			
	Int. to Mar. 28, 3 and 3-30th months..... 77.40			
	Protest.... 1.56	4,358.94	:19	16.09

1868.			Time.	Interest.
			m. ds.	
April 7	To sent D. D. Babcock, as per your order by telegraph	$ 5.00	:09	$ 88
" 13	To sent Atwater to run lumber from Pittsburg to Memphis	6,000.00		
" 13	To assumed your notes as follows:			
	Due J. Arnot, Jr., Mar. 26..	2,500.00	:21	10.20
			Cr.	
67	Due at Watkins, April 20...	2,500.00	:04	1.94
	Due H. D. Crane, May 28...	5,119.58	1:12	41.81
	Due at Owego, May 21.....	2,500.00	1:05	17.01
	Due at Owego, May 29.....	2,500.00	1:13	20.90
Feb. 18	To pd. your note at Metr. Bk. due Feb. 12.... ..$5,000.00			
	Protest..... 1.53			
	¼ pr. ct. exchange.. 12.50	5,014.03	2:04	62.39
Mar. 17	To sent Atwater at Warren, Pa... .....$3,000.00			
	Less returned..... 800.00	2,200.00	:30	12.83
				$597.12
				$87,958.54
	Balance interest due April 16			597.12
	Due J. Langdon.....			88,555.66

Elmira, New York, April 16, 1868.

68

Exhibit "C."

John S. Baldwin, in acc't with J. Langdon.

1868.	—DR.—		Time.	Interest.
			m. ds.	
April 16	To balance per statement rendered.....	$77,336.05	1:05	$526.31
May 14	To currency sent you to Pittsburg	500.00	:07	68
	Balance interest to May 21..	516.78		526.99
		$78,352.83		
	—CR.—			
April 25	By currency returned by Atwater.....	$2,020.00	:26	10.21
69	Bal. due J. Langdon May 21,	$76,332.83		

Elmira, May 21, 1868.

Exhibit "D."

John S. Baldwin, in acc't with Taylor, McBean & Co.

1867.		Assigned to T. E. Brown & Co.	
Aug. 22	Sundry cash items from May 21st		$ 1,061.50
" 22	Discount on sundry notes at 1st National Bank, this day discounted for acc't J. S. Baldwin, proceeds $2,566.86 credited to B. R. (disc. only		
70	charged J. S. B.)		38.38
	Cash		50.00
" 23	Paid your draft returned 17th	$2,527.78	
" 23	Paid Taylor your acc't 22d	2,558.33	5,086.11
" 30	Paid you cash		43.00
Dec. 31	Paid sundry cash items to date		356.50
" 31	Keystone Lumber Co. (ch'gd back)		10,000.00
1868			
Mar. 5	Sundry cash items to date		194.45
" 7	Advances made by J. Langdon		11,219.61
April 28	Advances, first raft, at Louisville	445.75	
	Telegrams	6.05	451.80
May 21	Advances made by J. Langdon as per acc't rendered		76,332.83
	First raft		
	Tel., McDonal	2.60	
71	W. W. Ballard's ex. to Cairo	50.00	
	McDonald's draft from Cairo	100.00	
	W. W. Ballard's draft. from Cairo	750.00	
	Paid W. O. Connell, raftsm'n	98.12	
	Tel. from J. Langdon	3.30	
	Brooms for washing lumber.	2.50	
	M. Miller, raftsman	116.00	
	For rope	4.75	
	Sundry expenses	5.44	
	Getting out raft	88.65	
	Cash 102.55		
	99.00		
		201.55	1,422.91
" 29	Cash to self		75.00
	Forward		106,332.09
1868.	Amount brought forward		106,332.09
May 22	Second raft		
	J. S. Baldwin, to go to Cairo	50.00	
72	" draft "	1,700.00	

1868.				
May 29	Tel. to Louisville		$ 1.50	$
" 30	For ex. T. E. B., Louisville..		250.00	
	Taking out 270,000 ft. at 45½ per M		121.50	
				2,123.00
	Third raft			
" 30	Order for groceries			12.94
June 3	Check drawn at Louisville by T. E. B.....			50.00
" 6	Davis Martin, services on raft			16.12
" 17	Expenses, second raft.....			273.84
" 15	Cash to self.....			36.00
	Paid Hammett to see about third raft.....			15.00
73	Third raft towards paying off men			28.00
" 19	Cash, self, in sundry amts...		10.00	
	" "		10.00	
	" "		3.00	
	" "		2.00	25.00
	Cash self			17.25
	Check to pay off men, third raft.....			734.45
	2d raft. Tug boat.....			387.50
	2d raft. To pay men.....			263.15
" 15	3d raft.....			
" 16	3d raft. Geo. Blazier, pilot.			301.93
" 19	3d raft. Paid for salvage on lumber lost.....			60.00
" 20	2d raft. Steamer Nevada, for going to raft.....			5.00
" 19	Cash to self			25.00
	Credit			
1867.				
May 1	By fare and expenses to Memphis, and sundry expenses for blank books, &c.....			61.10
April 22	By Keystone lumber Co....			10,000.00
May 13	By pro. 5 day draft on J. C. Sampson.....		5,000.00	4,947.50
" 21	By pro. 5 day draft on J. C. Sampson.....		2,500.00	2,473.75
" 30	By pro. 5 day draft on W. W. B. & Co.....		5,000.00	4,947.50
June 4	By pro. 5 day draft on W. W. B. & Co.....		5,000.00	4,947.50
	By two plows and castings from Elmira.....			67.20
" 11	By pro. 5 day draft on W. W. B. & Co.....		2,500.00	2,473.73

1867.			
June 21	By pro. 5 day draft on W. W. B. & Co.....	$2,500.00	$2,473.75
	By charged Abner Taylor, your credit.....		273.00
" 22	By pro. 10 day draft on W. W. B. & Co	2,500.00	2,470.63
" 24	By pro. 15 day draft on W. W. B. & Co.....	5,000.00	4,937.50
" 29	By pro. 15 day draft on W. W. B. & Co.....	4,000.00	3,950.00
July 6	By pro. 15 day draft on W. W. B. & Co.	5,000.00	4,937.50
75 " 19	By pro. 15 day draft on W. W. B. & Co.....	2,500.00	2,475.00
Dec. 1	By services from May 1, to Dec. 1		1,750.00
1868.			
Aug. 18	By cash.....		10.00
May 16	By 1st raft		
	401,378 ft. 3 inch,		
	51,889 ft. inch,		
	26,170 pickets.		
	479,437		9,588.74
June	2d raft.....		11,026.30
	804,479 ft. 3 inch,		
	161,201 ft. inch,		
	88,963 pickets.		
	1,054,643		
	Less Cr. J. L. 503,328		
	551,315 ft. at $20.		
1868.	Expenses on 2d raft charged J. L., whole amount.....	3,065.43	1,463.28
June 25	Bal. due T. E. Brown & Co.		35,497.27
			110,771.27

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1868. John S. Baldwin, in acc't with T. E. Brown & Co.

June 24	Bal. (as per bill by Crane)..			$35,497.27
" 20	Order on Linds, Arnold & Co.	$108.10		
	" J. D. Williams	33.50		
			$ 141.60	
	Sundries cash.....		321.00	
July1&4	$20.00, 2.00	22.00		
" 6	5.00, 25.00, 22.68.....	52.68		
" 11	Paid labor.....	303.68		
" 15	38.24, 100.25, 1.00, 100.00...	239.49		
" 17	10.00, 5.00, 10.00, 10.00, 5.00	40.00		
			657.85	

1868.					
Aug.	25	Orders on Williams.....	$ 46.50		
"	31	10.00, 2.00, 25.05, 50.00, 21.00, 91.67.....	199.72		
		Order on Flynn.....	118.72		
		Handling, and disc. on refuse lumber	828.09		
				1,193.03	
Sept.	25	Pd. Widrig, board bill.....	278.43		
		Draft on us from Elmira. ..	75.00		
"	30	16th to 30th.....	20.20		
				373.63	
Oct.	22	Cash sent Mrs. B.....	50.00		
"	30	" "	100.00		
		Returned from sale house...	25.00		
77	31	Order on Williams.....	4.60		
		Ames, Beattie & Co... ..	24.50		
		Stout & Bros....	3.75		
		Rick, Stix & Co.....	128.00		
		Cash....	40.00	375.85	
Nov.	1	Wagon sold		130.00	
"	30	42.50, 3.60, 5.90.....	52.00		
Dec.	15	Cash, Blazier.....	30.00		
"	31	Order on Berlin....	12.00		
		" " Williams.....	60.00		
		Cash.....	27.28	181.28	$38,871.51
1869.		Am't of debits brought over		38,871.51	
Jan'y	31	Order on Mrs. Hunter....	35.55		
		" " Williams.....	75.00		
Feb'y	10	" " Wells & Coll..	25.00		
		" " Chas. Levy Jay	15.50		
		Paid board bill to Wedrig.	15.43		
		Cash..	3.00		
	15	326.00, 3.00, 4.00	333.00	502.48	
Mch.	15	Interest as follows:			
		Int. on bal. debit.			
78		June 1, 45,687.61 to July 1st, 1 m.....	266.51		
		July 1, 33,855.56 to Aug. 1, 1 m....	197.49		
		Aug. 1, 20,823.11, Sept 1, 1 m	121.47		
		Sept, 1. 21,849.07, Nov. 1, 2 m.....	254.91		
		Nov. 1, 22,683.75, Jan. 1,2m	264.64		
		Jan'y 1, 22,840.03, Feb. 1, 1 m.....	133.23		
		Feb'y 1, 23,327.51, Mch. 1, 5, 1½ m.....	204.12	1,442.37	
		Trade at Lowenstine & Bros.		70.14	
		Atwaler's bill, as rendered by Langdon.....		232.83	41,119.33

				Cr.
1868.				
June	28	By 170 lbs. rope	30.60	
Aug.	15	30.00, 21.00 1.00	52.00	
		27.60, 85.47, 3.00	116.07	
July	11	684,515 ft. lumber, 3d rft, 20 m	13,690.30	
Sept.	17	13.80, 15.00	28.80	
Oct.	31	100 lbs. rope	15.00	
Nov.	27	Cash	25.00	
Jan'y	15	Paid	15.00	
		Ex. Langdon, lumber to Cairo, 503,328 ft.....412	2,073.71	
79				16,046.48

1869.
Mch. 17. Balance due T. E. Brown, as per firm books shown $25,072.85

Separate account made up in part from court record.

1868.			
		Account Hungerford, judg't *and costs*	
June	1	Paid Bullock & Anderson, his atty's..	50.00
1869.			
Sept.	1	Paid chancery court, Louisville	39.55
"	1	Depositions.....	50.38
1870.			
Feb.	24	Printing brief.....	42.00
Oct.	24	Paid on judg't.....	1,000.00
"	26	Paid clerk court of appeals.....	4.80
Dec.	19	Paid on judgment.....	1,000.00
1871.			
Feb.	22	Paid on judgment.....	,000.00
Mch.	22	Paid on judgment.....	1,000.00
"	22	Paid Bullock & Anderson, his atty's..	50.00
Sept.	26	Paid on judgment.....	1,344.13
"	"	Paid Bullock & Anderson, his atty's..	152.13
80			
1873.			
Feb.	22	Paid Bullock & Anderson, his atty's..	47.00

Exhibit "D."

1876.			
Aug.	1	Int. account on this judgment to Aug. 1	1,804.80
		Total due on the acc't, to Aug. 1, 1876.	7,634.29

RECAPITULATION.

1876.		
	Balance due T. E. Brown & Co., on book acc't, 17 March, '69.....	25,972.80
	Int. on this bal. from 17th Mch., 1869, to 1st Aug., 1876.....	11,093.64
Aug.	1 Hungerford judgment.....	7,634.29
Aug.	1 Total due T. E. Brown & Co., 1st Aug., 1876.....	43,800.78

81 Exhibit "E."

The executors of Jarvis Langdon, deceased, for value received, hereby sell, assign, set over and trasfer unto Talmadge E. Brown, all the right, title, and interest of J. Langdon, deceased, in or to the undivided property or assets of the late firm of T. E. Brown & Co., of Memphis, Tennessee.

Subject, however, to all taxes and assessments thereon now made or hereafter to be made to all indebtedness therefor and to all liabilities of said firm or any of the members thereof for transactions in the business of the firm in tort or contract and subject to all judgments against the said firm or any member thereof, recovered or to be recovered, and all costs, disbursements, officers and counsel fees, and all liabilities for contribution to any other partner or person in consideration of moneys paid or to be paid upon any liability.

Of, from and against all of which real or possible liabilities, and of, from and against any other liability growing out of the transactions of said firm, said Brown agrees to fully indemnify and save harmless the executors, heirs and next of kin of said J. Langdon, deceased.

82 And said Brown further agrees to pay and discharge any just and legal claim of any person or persons whomsoever, for any share of the profits or proceeds of the business of said firm, whether said claim be against the said firm or against said Langdon, deceased, individually, and to fully indemnify and save harmless the executors' heirs and next of kin of said Langdon, of, from and against any such claim. All the aforesaid agreements of indemnity to apply not only to liability growing out of the transactions of said firm but also to any possible liability growing out of the transactions of the predecessors of said firm.

Said Brown agrees to pay for such interest, as follows:

First. Upon the assignment of the interest above mentioned, twenty-five thousand dollars ($25,000) in cash, together with the further amount of fifty thousand dollars ($50,000) in notes, satisfactorily endorsed by B. F. Allen or other satisfactory endorsers, and running from three (3) to eighteen (18) months at a fair average time from these extreme points of time mentioned.

83 Second. A certain tract of land consisting of one hundred and thirty (130) acres, situated within the limits of the corporation of the city of Des Moines, Iowa, and also a certain plantation situated on White river, in Arkansas, consisting of sixteen hundred (1600) acres of land and all the buildings, improvements and appurtenances belonging

thereto. In reference to the land in Iowa and Arkansas, the purchaser hereby agrees that in five (5) years from the date of this contract, he will, if the estate or its legal assigns so desire, purchase back the lands for twenty-five thousand ($25,000) dollars, paying that sum in cash.

This agreement is upon condition that the aforesaid two tracts of land are owned by said Brown in fee simple absolute, free and clear of all taxes, assessments and encumbrances of whatever nature and that they shall before this assignment shall be operative, be conveyed by full covenant deeds to the executors of said J. Langdon, deceased, said conveyance to be executed also by the wife of said Brown and said executors to be furnished with properly authenticated abstracts of title thereof, showing the title thereof to be perfect and that they are free and clear of all incumbrances.

84 The executors further agree that upon the final performance of this contract, they will surrender certain notes now held by the estate against T. E. Brown, amounting to the sum of seventeen thousand dollars ($17,000), the aforesaid interest shall be assigned upon the execution of said contract and the delivery of notes, money and deeds of the lands as afore mentioned.

Said Brown is to have sixty (60) days within which to make the delivery and payments described in this contract. Dated, 25th of April, 1871.

The executors of Jarvis Langdon per
J. D. F. SLEE, *Executor and Attorney.*
T. E. BROWN.

The following interlineations were made before the execution of this contract, "by B. F. Allen or other satisfactory indorsers." Also, "said Brown is to have sixty days (60) within which to make the delivery and payments described in this contract."

C. J. LANGDON, *Executor.*
85 T. E. BROWN.

Both parties have this day performed the foregoing contract in the following particulars: Said Brown has paid the $25,000 cash, and $50,000 in endorsed notes, and delivered deeds to the real estate. Said executors have delivered their assignment of the interest of said estate in the assets of the firm of T. E. Brown & Co., and release of all claims for advances or loans by J. Langdon to said firm and surrendered the notes of said Brown.

J. D. F. SLEE, *Executor.*
C. J. LANGDON, *Executor.*
T. W. CRANE, *Executor.*
SAMUEL L. CLEMENS, *Executor.*
OLIVIA L. LANGDON, *Executrix.*

ELMIRA, June 25, 1871.

In consideration of one hundred thousand dollars this day received of T. E. Brown, as by the terms of our contract made with him bearing date April 25, 1871, we, the executors of the last will of Jarvis

Landon, deceased, do hereby sell, assign and transfer to said T. E. Brown, all our rights and all the right, title and interest Jarvis Langdon had in his lifetime in and to the property and assets of the firm of T. E. Brown & Co., at Memphis, Tennessee, subject to the terms and conditions of our said contract of April 25, 1871, above mentioned.

J. D. F. SLEE, *Executor.*
86 C. J. LANGDON, *Executor.*
T. W. CRANE, *Executor.*
SAMUEL L. CLEMENS, *Executor.*
OLIVIA L. LANGDON, *Executrix.*

ELMIRA, June 25, 1871.

(Endorsed:) In U. S. Circuit Court, District of Iowa, John D. F. Slee, Charles J. Langdon, Theodore W. Crane and Samuel L. Clemens, executors of Jarvis Langdon, deceased *vs.* Talmadge E. Brown and Anna L. Brown, his wife. Cross-bill of T. E. Brown.

J. M. ST. JOHN, of Des Moines,
Solicitor for Complainant in Cross-bill.
C. C. COLE, of Des Moines,
Of Counsel.
Filed, September 4, 1876.
(Signed,) E. R. MASON, *Clerk.*

Afterward, to-wit: On the 30th day of September, A. D. 1876, said complainant by his said solicitors filed a motion to strike respondent's cross-bill, which said motion to strike is in the words and figures following, to-wit:

JOHN D. F. SLEE, CHARLES J. LANGDON, THEODORE W. CRANE and SAMUEL L. CLEMENS, executors of JARVIS LANGDON, deceased,
87 *vs.*
TALMADGE E. BROWN and wife.
} Motion to strike Cross-bill from file.

And now come complainants and move to strike from the files in this cause the cross-bill of respondents filed herein and for cause of motion show: 1. That under the rules and practice of this court no cross-bill can be filed in this cause, but the same must be docketed as a distinct suit and subpœna issue to these complainants as respondents in said cross-bill.

(Signed,) NOURSE & KAUFFMAN,
Solicitors for Complainant.

(Endorsed:) John D. F. Slee et al. *vs.* T. E. Brown. Motion to strike cross-bill.

Filed September 30, 1876. E. R. MASON, *Clerk.*
NOURSE & KAUFFMAN,
Solicitors for Complainants.

And afterward, to-wit: on the 14th day of October, A. D. 1876, the same being of the October term of said court there appears in the record of the proceedings thereof in said cause the following entry, to-wit:

United States Circuit Court, District of Iowa, October Term, 1876.

SATURDAY, October 14, 1876.

JOHN D. F. SLEE, ET AL., Ex'rs,
vs.
88 TALMADGE E. BROWN. } No. 736. Equity.

This cause coming on for hearing complainants were given leave to amend their bill of complaint by inserting name of additional executor.

And under said order of leave to amend, the complainants' counsel interlined the name of Olivia L. Langdon in the title and body of their said original bill.

Afterward, to-wit: On the 16th day of October, 1876, the same being of the October Term of said court, there appears in the record of the proceedings thereof in said cause the following entry, to-wit:

United States Circuit Court, District of Iowa, October Term, 1876.

MONDAY, October 16, 1876.

JOHN D. F. SLEE ET AL., Ex'rs, JARVIS LANGDON,
vs.
TALMADGE E. BROWN, ET UX. } No. 736. Equity.

This cause coming on this day for hearing and plaintiffs were given leave to withdraw their motion to strike from files the cross-bill of defendant, Talmadge E. Brown, and to file demurrer to the same.

On the same day, to-wit: The said complainants by their said solicitors, filed a demurrer to said respondents' cross-bill, which said demurrer is in the words and figures following, to-wit:

89 In the Circuit Court of the United States, District of Iowa.

J. D. F. SLEE ET AL., executors,
vs
T. E. BROWN, ET UX. } Demurrer in Equity.

The demurrer of J. D. F. Slee, Charles J. Langdon, Theodore W. Crane, Olivia L. Langdon and Samuel L. Clemens, executors of the estate of Jarvis Langdon, deceased, plaintiffs, to the cross-bill of T. E. Brown and Anna L. Brown, his wife, defendants.

These plaintiffs, by protestation, not confessing all or any of the matters and things in the defendants' cross-bill contained to be true in such manner and form as the same is therein set forth and alleged, doth demur to said cross-bill, and for cause of demurrer showeth that

1. The said cross-bill, as appears upon its face, sets out no cause

of action or of equitable relief against the defendants in said cross-bill.

90 2. The said cross-bill shows by the exhibits attached thereto that by the agreement of purchase the said estate of Jarvis Langdon was released from all liability of every kind and nature growing out of it, or in any way connected with the business of said firm of T. E. Brown & Co.

3. The said cross-bill shows on its face the want of equity and sets out no cause of action against the said defendants therein.

Wherefore, and for divers other good causes of demurrer appearing in the said cross-bill, the plaintiffs doth demur thereto, and humbly demand the judgment of this court, whether they shall be compelled to make any further or other answer to the said cross-bill: and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

(Signed) NOURSE & KAUFFMAN,
Sols. for Def't in cross-bill.

I, C. C. Nourse, hereby certify that I am one of the counsel for defendants in the cross-bill of T. E. Brown filed herein, and that, in my opinion, the demurrer herein filed to the said cross-bill is well founded in point of law.

(Signed) C. C. NOURSE.

91

UNITED STATES OF AMERICA, }
DISTRICT OF IOWA. } ss.

I, C. C. Nourse, on oath state that as counsel for defendants in the said cross bill of T. E. Brown filed herein, I had charge of this suit, and that the demurrer filed herein was filed by me as such counsel in the belief that it is well taken in point of law; and I state that it was not filed for delay.

(Signed) C. C. NOURSE.

Subscribed and sworn to before me, this 16th day of October, 1876.

(Signed) ED. R. MASON, *Clerk.*

(Endorsed:) 736. In the U. S. Circuit Court, Dist. of Iowa, J. D. F. Slee *et al.*, executors, *vs.* T. E. Brown *et ux.* Demurrer to cross-bill.

Filed, Oct. 16, 1876.

92 E. R. MASON, *Clerk.*

Afterward, to-wit: November 2d, 1876, same being of the October term of said court, there appears on the records of the proceedings thereof in said cause, the following entry, to-wit:

United States Circuit Court, District of Iowa, October Term, 1876, November 2, 1876—Thursday.

JOHN D. F. SLEE ET AL., executors, *vs.* T. E. BROWN, ET UX. } No. 736. Equity.

This cause coming on this day for hearing on complainants' demurrer to plaintiff's cross-bill, plaintiff appeared by Nourse & Kauffman, and defendants by C. C. Cole and J. M. St. John, Esqrs., and the court, after argument of counsel thereon, took the same under advisement, and the time for taking testimony was extended to April 1, 1877.

And afterward, to-wit: on the 17th day of May, A. D. 1877, the same being of the May term of said court, there appears on the records of the proceedings thereof in said cause, the following entry, to-wit:

93 United States Circuit Court, District of Iowa, May Term, 1877, May 17, 1877—Thursday.

JOHN D. F. SLEE ET AL., executors, *vs.* TALMADGE E. BROWN ET UX. } Original bill. No. 736 Equity.

TALMADGE E. BROWN, *vs.* JOHN D. F. SLEE ET AL., executors. } Cross-bill.

This cause having been heretofore submitted to the court upon the demurrer of complainant to the cross-bill of defendant, and the court being now fully advised, sustained said demurrer.

On the same day, to-wit: May 17th, A. D. 1877, there was filed in said clerk's office a stipulation of facts, which said stipulation is in words and figures as follows, to-wit:

94 In the United States Circuit Court, District of Iowa.

JOHN D. F. SLEE, CHAS. J. LANGDON, THEODORE W. CRANE, SAMUEL L. CLEMENS, and OLIVIA LANGDON, executors of JARVIS LANGDON, deceased, *vs.* TALMADGE E. BROWN and ANNA L. BROWN. } Stipulation of facts.

The following agreement of facts is made to be used on the trial of the above entitled cause in addition to any other matters that may be proved by either party by competent evidence.

1. It is agreed that Jarvis Langdon died at Elmira, in the State of New York, on or about the 6th day of August, 1870.

2. That he by will appointed the complainants executors of his estate, and that said will was duly proved before the proper surrogate at Chemung county, New York, on the 12th day of August, 1870, and that said executors qualified according to law in said State of New York.

3. That by the authority conferred in said will the said executors were authorized to make the several agreements entered into with defendants hereinafter set out.

4. That at and prior to the death of said Jarvis Langdon, he and the respondent, T. E. Brown, were co-partners doing business under the name and style of T. E. Brown & Co., in a certain business of paving streets, and in a certain contract for paving the streets of the city of Memphis, Tenn.

95 5. That on the 25th of April, 1871, the said complainants made and executed a certain contract or agreement with the said T. E. Brown, a copy of which is hereto attached, marked exhibit No. one.

6. That afterwards, about the —— day of ———, 1871, the said contract of April 21, 1871, was so far performed as was specified in papers Nos. two and three, copies of which are hereto attached.

The originals were executed as evidence of said performance at the time, and the said T. E. Brown and wife executed and delivered a deed, a copy of which is hereto attached, marked exhibit No. four; said deed, for convenience, was made to Charles J. Langdon, but was executed in pursuance of the agreement of April 25, 1871, and for the uses and purposes named in said agreement.

7. That on the 3d day of July, 1871, a lease was executed to the said T. E. Brown, a copy of which is attached, marked exhibit five.

8. That on the 30th day of August, 1871, the parties executed a supplemental agreement, a copy of which is hereto attached, marked exhibit No. six.

9. That in pursuance of said supplemental agreement, said T. E. Brown assigned to the said executors the said judgment against Buena Vista county, and afterward collected and remitted to said executors July 12, 1872, $1279.00 net, allowing $3.20 for collecting check.

96 10. That on the 30th day of October, 1875, C. J. Langdon, one of the executors, wrote to said T. E. Brown, and mailed to his address at Des Moines, Iowa, a letter, a copy of which is hereto attached, marked exhibit No. seven, which letter was received by said Brown by due course of mail.

11. That said T. E. Brown made no response to said letter until the 26th of May, 1876, when he wrote and mailed to Charles J. Langdon, to his address at Elmira, New York, a letter, a copy of which is hereto attached as exhibit No. eight.

12. That said Charles J. Langdon answered said letter on the 31st day of May, 1876, and declined the proposition therein contained.

13. That said T. E. Brown answered said letter of May 31st, 1876, a copy of which is hereto annexed, marked exhibit No. nine.

14. That on the 26th day of June, 1876, complainants caused to be tendered to said T. E. Brown, a deed, a copy of which is attached, marked exhibit No. ten, and demanded of said Brown the payment of the sum of $23,381.14; and also, on the 17th of July, 1876, complain-

ants caused the said deed again to be tendered to said Brown, and also tendered to him a re-assignment of the Buena Vista county judgment, and demanded of said Brown said sum of $23,381.14, with six per cent interest from said 19th of June, 1876.

15. That said Brown, at the time of said offer and said demand, made no objection to the form of said re-conveyance or the computation of the amount claimed to be due, but declined to pay any money or receive any conveyance.

(Signed) NOURSE, KAUFFMAN & CO., *for executors of Jarvis Langdon, deceased, complainants in the above cause.*

97

(Signed) T. E. BROWN,
ANNA L. BROWN, *by T. E. Brown, her Agent.*

Exhibit No. 1.

The executors of Jarvis Langdon, deceased, for value received, hereby sell, assign, set over, and transfer unto Talmadge E. Brown, all the right, title and interest of J. Langdon, deceased, in or to the undivided property or assets of the late firm of T. E. Brown & Co., of Memphis, Tennessee.

Subject, however, to all taxes and assessments thereon, now made or hereafter to be made, to all indebtedness therefor and to all liabilities of said firm or any of the members thereof, for transactions in the business of the firm in tort and contract and subject to all judgments against the said firm or any member thereof, recovered or to be recovered, and all costs, disbursements, officers and counsel fees, and all liability for contribution to any other partner or person in consideration of moneys paid or to be paid upon any liability of, from and against all of which real or possible liabilities and of, from and against any other liability growing out of the transactions of said firm, said Brown agrees to fully indemnify and save harmless the executors, heirs and next of kin of said J. Langdon, deceased.

98

And said Brown further agrees to pay and discharge any just and legal claim of any person or persons whomsoever for any share of the profits or proceeds of the business of said firm, whether said claim be against the said firm or against the said Langdon, deceased, individually, and to fully indemnify and save harmless the executors, heirs and next of kin of said Langdon of, from and against any such claim; all the aforesaid agreements of indemnity to apply not only to the liability growing out of the transactions of said firm but also to any possible liability growing out of the transactions of the predecessors of said firm.

Said Brown agrees to pay for such interest, as follows:

First. Upon the assignment of the interest above mentioned twenty-five thousand dollars ($25,000) in cash, together with the further amount of fifty thousand dollars ($50,000) in notes, satisfactorily endorsed by B. F. Allen or other satisfactory endorsers, and running from three (3) to eighteen (18) months at a fair average time from these extreme points of time mentioned.

Second. A certain tract of land consisting of one hundred and thirty (130) acres, situated within the limits of the corporation of the city of Des Moines, Iowa, and also a certain plantation situated on White river, in Arkansas, consisting of sixteen hundred (1600) acres of land and all the buildings, improvements and appurtenances belonging thereto. In reference to the lands in Iowa and Arkansas, the purchaser hereby agrees that in five years from the date of this contract he will if the estate or its legal assigns so desire purchase back the lands for twenty-five thousand ($25,000) dollars, paying that sum in cash.

99 This agreement is upon condition that the aforesaid two tracts of land are owned by said Brown in fee simple absolute, free and clear of all taxes, assessments and incumbrances of whatever nature, and that they shall before this assignment shall be operative, be conveyed by full covenant deeds to the executors of said J. Langdon, deceased, said conveyances to be executed also by the wife of said Brown and said executors to be furnished with properly authenticated abstracts of title thereof, showing the title thereof to be perfect and that they are free and clear of all incumbrances.

The executors further agree that upon the final performance of this contract, they will surrender certain notes now held by the estate against T. E. Brown, amounting to the sum of seventeen thousand dollars ($17,000), the aforesaid interest shall be assigned upon the execution of said contract and the delivery of notes, money and deed of the lands as aforementioned.

Said Brown is to have sixty (60) days within which to make delivery and payments described in this contract.

Dated, 25th April, 1871.

The estate of J. Langdon, per

J. D. F. SLEE, *Executor and Atto*

100 T. E. BROWN.

Exhibit No. 2.

Both parties have this day performed the foregoing con the following particulars: Said Brown has paid the $25,000 $50,000 in indorsed notes, and delivered deeds to the real est executors have delivered their assignment of the interest of tate in the assets of the firm of T. E. Brown & Co., and rele claims for advances or loans by J. Langdon to said firm, an dered the notes of said Brown.

(Signed) J. D. F. SLEE, *Executor.*
C. J. LANGDON, *Executo*
T. W. CRANE, *Executor.*
SAM'L L. CLEMENS. *Ex*

Elmira, June 25, 1871. OLIVIA L. LANGDON, *Executrix.*

Exhibit No. 3.

In consideration of one hundred thousand dollars, this day re ceived of T. E. Brown, as by the terms of our contract made with

ants caused the said deed again to be tendered to said Brown, and also tendered to him a re-assignment of the Buena Vista county judgment, and demanded of said Brown said sum of $23,381.14, with six per cent interest from said 19th of June, 1876.

15. That said Brown, at the time of said offer and said demand, made no objection to the form of said re-conveyance or the computation of the amount claimed to be due, but declined to pay any money or receive any conveyance.

(Signed) NOURSE, KAUFFMAN & CO., *for executors of Jarvis Langdon, deceased, complainants in the above cause.*

97

(Signed) T. E. BROWN,
ANNA L. BROWN, *by T. E. Brown, her Agent.*

Exhibit No. 1.

The executors of Jarvis Langdon, deceased, for value received, hereby sell, assign, set over, and transfer unto Talmadge E. Brown, all the right, title and interest of J. Langdon, deceased, in or to the undivided property or assets of the late firm of T. E. Brown & Co., of Memphis, Tennessee.

Subject, however, to all taxes and assessments thereon, now made or hereafter to be made, to all indebtedness therefor and to all liabilities of said firm or any of the members thereof, for transactions in the business of the firm in tort and contract and subject to all judgments against the said firm or any member thereof, recovered or to be recovered, and all costs, disbursements, officers and counsel fees, and all liability for contribution to any other partner or person in consideration of moneys paid or to be paid upon any liability of, from and against all of which real or possible liabilities and of, from and against any other liability growing out of the transactions of said firm, said Brown agrees to fully indemnify and save harmless the executors, heirs and next of kin of said J. Langdon, deceased.

98

And said Brown further agrees to pay and discharge any just and legal claim of any person or persons whomsoever for any share of the profits or proceeds of the business of said firm, whether said claim be against the said firm or against the said Langdon, deceased, individually, and to fully indemnify and save harmless the executors, heirs and next of kin of said Langdon of, from and against any such claim; all the aforesaid agreements of indemnity to apply not only to the liability growing out of the transactions of said firm but also to any possible liability growing out of the transactions of the predecessors of said firm.

Said Brown agrees to pay for such interest, as follows:

First. Upon the assignment of the interest above mentioned twenty-five thousand dollars ($25,000) in cash, together with the further amount of fifty thousand dollars ($50,000) in notes, satisfactorily endorsed by B. F. Allen or other satisfactory endorsers, and running from three (3) to eighteen (18) months at a fair average time from these extreme points of time mentioned.

Second. A certain tract of land consisting of one hundred and thirty (130) acres, situated within the limits of the corporation of the city of Des Moines, Iowa, and also a certain plantation situated on White river, in Arkansas, consisting of sixteen hundred (1600) acres of land and all the buildings, improvements and appurtenances belonging thereto. In reference to the lands in Iowa and Arkansas, the purchaser hereby agrees that in five years from the date of this contract he will if the estate or its legal assigns so desire purchase back the lands for twenty-five thousand ($25,000) dollars, paying that sum in cash.

99 This agreement is upon condition that the aforesaid two tracts of land are owned by said Brown in fee simple absolute, free and clear of all taxes, assessments and incumbrances of whatever nature, and that they shall before this assignment shall be operative, be conveyed by full covenant deeds to the executors of said J. Langdon, deceased, said conveyances to be executed also by the wife of said Brown and said executors to be furnished with properly authenticated abstracts of title thereof, showing the title thereof to be perfect and that they are free and clear of all incumbrances.

The executors further agree that upon the final performance of this contract, they will surrender certain notes now held by the estate against T. E. Brown, amounting to the sum of seventeen thousand dollars ($17,000), the aforesaid interest shall be assigned upon the execution of said contract and the delivery of notes, money and deeds of the lands as aforementioned.

Said Brown is to have sixty (60) days within which to make the delivery and payments described in this contract.

Dated, 25th April, 1871.

The estate of J. Langdon, per

J. D. F. SLEE, *Executor and Attorney.*

100 T. E. BROWN.

Exhibit No. 2.

Both parties have this day performed the foregoing contract in the following particulars: Said Brown has paid the $25,000 cash, and $50,000 in indorsed notes, and delivered deeds to the real estate. Said executors have delivered their assignment of the interest of said estate in the assets of the firm of T. E. Brown & Co., and release of all claims for advances or loans by J. Langdon to said firm, and surrendered the notes of said Brown

(Signed) J. D. F. SLEE, *Executor.*
C. J. LANGDON, *Executor.*
T. W. CRANE, *Executor.*
SAM'L L. CLEMENS, *Executor.*
Elmira, June 25, 1871. OLIVIA L. LANGDON, *Executrix.*

Exhibit No. 3.

In consideration of one hundred thousand dollars, this day received of T. E. Brown, as by the terms of our contract made with

ants caused the said deed again to be tendered to said Brown, and also tendered to him a re-assignment of the Buena Vista county judgment, and demanded of said Brown said sum of $23,381.14, with six per cent interest from said 19th of June, 1876.

15. That said Brown, at the time of said offer and said demand, made no objection to the form of said re-conveyance or the computation of the amount claimed to be due, but declined to pay any money or receive any conveyance.

(Signed) NOURSE, KAUFFMAN & CO., *for executors of Jarvis Langdon, deceased, complainants in the above cause.*

97

(Signed) T. E. BROWN,
ANNA L. BROWN, *by T. E. Brown, her Agent.*

Exhibit No. 1.

The executors of Jarvis Langdon, deceased, for value received, hereby sell, assign, set over, and transfer unto Talmadge E. Brown, all the right, title and interest of J. Langdon, deceased, in or to the undivided property or assets of the late firm of T. E. Brown & Co., of Memphis, Tennessee.

Subject, however, to all taxes and assessments thereon, now made or hereafter to be made, to all indebtedness therefor and to all liabilities of said firm or any of the members thereof, for transactions in the business of the firm in tort and contract and subject to all judgments against the said firm or any member thereof, recovered or to be recovered, and all costs, disbursements, officers and counsel fees, and all liability for contribution to any other partner or person in consideration of moneys paid or to be paid upon any liability of, from and against all of which real or possible liabilities and of, from and against any other liability growing out of the transactions of said firm, said Brown agrees to fully indemnify and save harmless the executors, heirs and next of kin of said J. Langdon, deceased.

98

And said Brown further agrees to pay and discharge any just and legal claim of any person or persons whomsoever for any share of the profits or proceeds of the business of said firm, whether said claim be against the said firm or against the said Langdon, deceased, individually, and to fully indemnify and save harmless the executors, heirs and next of kin of said Langdon of, from and against any such claim; all the aforesaid agreements of indemnity to apply not only to the liability growing out of the transactions of said firm but also to any possible liability growing out of the transactions of the predecessors of said firm.

Said Brown agrees to pay for such interest, as follows:

First. Upon the assignment of the interest above mentioned twenty-five thousand dollars ($25,000) in cash, together with the further amount of fifty thousand dollars ($50,000) in notes, satisfactorily endorsed by B. F. Allen or other satisfactory endorsers, and running from three (3) to eighteen (18) months at a fair average time from these extreme points of time mentioned.

Second. A certain tract of land consisting of one hundred and thirty (130) acres, situated within the limits of the corporation of the city of Des Moines, Iowa, and also a certain plantation situated on White river, in Arkansas, consisting of sixteen hundred (1600) acres of land and all the buildings, improvements and appurtenances belonging thereto. In reference to the lands in Iowa and Arkansas, the purchaser hereby agrees that in five years from the date of this contract he will if the estate or its legal assigns so desire purchase back the lands for twenty-five thousand ($25,000) dollars, paying that sum in cash.

99 This agreement is upon condition that the aforesaid two tracts of land are owned by said Brown in fee simple absolute, free and clear of all taxes, assessments and incumbrances of whatever nature, and that they shall before this assignment shall be operative, be conveyed by full covenant deeds to the executors of said J. Langdon, deceased, said conveyances to be executed also by the wife of said Brown and said executors to be furnished with properly authenticated abstracts of title thereof, showing the title thereof to be perfect and that they are free and clear of all incumbrances.

The executors further agree that upon the final performance of this contract, they will surrender certain notes now held by the estate against T. E. Brown, amounting to the sum of seventeen thousand dollars ($17,000), the aforesaid interest shall be assigned upon the execution of said contract and the delivery of notes, money and deeds of the lands as aforementioned.

Said Brown is to have sixty (60) days within which to make the delivery and payments described in this contract.

Dated, 25th April, 1871.

The estate of J. Langdon, per

J. D. F. SLEE, *Executor and Attorney.*

100 T. E. BROWN.

Exhibit No. 2.

Both parties have this day performed the foregoing contract in the following particulars: Said Brown has paid the $25,000 cash, and $50,000 in indorsed notes, and delivered deeds to the real estate. Said executors have delivered their assignment of the interest of said estate in the assets of the firm of T. E. Brown & Co., and release of all claims for advances or loans by J. Langdon to said firm, and surrendered the notes of said Brown.

(Signed) J. D. F. SLEE, *Executor.*
C. J. LANGDON, *Executor.*
T. W. CRANE, *Executor.*
SAM'L L. CLEMENS, *Executor.*
Elmira, June 25, 1871. OLIVIA L. LANGDON, *Executrix.*

Exhibit No. 3.

In consideration of one hundred thousand dollars, this day received of T. E. Brown, as by the terms of our contract made with

him bearing date April 25, 1871, we, the executors of the last will of Jarvis Langdon, deceased, do hereby sell, assign, and transfer to said T. E. Brown all the right, title and interest Jarvis Langdon had in his lifetime in and to the property and assets of the firm of T. E. Brown & Co., at Memphis, Tennessee, subject to the terms and conditions of our said contract of April 25, 1871, above mentioned.

(Signed) J. D. F. SLEE, *Executor.*
C. J. LANGDON, *Executor.*
101 T. W. CRANE, *Executor.*
SAM'L L. CLEMENS, *Executor.*
Elmira, June 25, 1871. OLIVIA L. LANGDON, *Executrix.*

Exhibit No. 4.

Know all men by these presents:

That we, Talmadge E. Brown, Anna L. Brown, of Des Moines, Polk county, Iowa, in consideration of the sum of five thousand dollars in hand paid by Chas. J. Langdon, of Elmira, Chemung county, and state of New York, do hereby sell and convey unto the said Charles J. Langdon the following described premises, situated in the county of Polk, and state of Iowa, to-wit: Lots No. one (1), and two (2), in section No. eight (8), and so much of the northeast quarter of the northeast quarter of said section eight (8), as lies south of Mulberry street in the city of Des Moines; also, so much of lot No. three (3), in said
102 section as lies south of said Mulberry street; also, a strip of land thirteen and one-half (13½), rods wide off the west side of the southwest quarter of the northwest quarter of the northwest quarter of section No. nine (9); also, a strip of land thirteen and one-half (13½) rods wide and lying south of said Mulberry street, in the west side of the northwest quarter of the northwest quarter of said section No. nine (9); also, all that portion of land lying west of Iowa street and north of the south line of what was formerly known as Mulberry street in said city of Des Moines, and bounded on the west by Coon river, and on the north by the right-of-way of the Des Moines Valley railroad, except so much thereof as was deeded by said Brown, July 11, 1870, to the city of Des Moines for the purposes of a street, all being in township No. seventy-eight (78) north, range No. twenty-four (24) west, of the 5th P. M., and situated within the said corporate limits of the said city of Des Moines, and containing in all one hundred and thirty acres, more or less, and the said Talmadge E. Brown hereby covenants with the said C. J. Langdon that he holds said premises by good and perfect title; that he has good right and lawful authority to sell and convey the same; that they are free and clear of all liens and encumbrances whatever; and he covenants to warrant and defend the said premises against the lawful claims of all persons whomsoever.

103 It is intended by this deed to convey to the said Charles J. Langdon all the real estate owned by the said Brown in said sections eight (8), and nine (9), lying south of the right-of-way limits of the Des Moines Valley railroad.

And Anna L. Brown, wife of the said T. E. Brown, hereby relin-

quishes all right of dower in and to said real estate. Witness our hands at Des Moines, Iowa, this 18th day of May, A. D. 1871.

{ STAMP. } TALMADGE E. BROWN.
{ $3.00. } ANNA L. BROWN.

THE STATE OF IOWA, } ss.
POLK COUNTY. }

On this 18th day of May, A. D. 1871, personally appeared before the undersigned, a notary public in and for said county and State, the above named Talmadge E. Brown and Anna L. Brown, to me personally known to be the identical persons whose names are affixed to the foregoing deed as grantors thereto, and acknowledged the execution of the same to be their voluntary act and deed. The words "of the South line" interlined before signing.

[SEAL.] Witness my hand and notarial seal, at the city of Des Moines, the day and date last aforesaid.

JACOB M. ST. JOHN, *Notary Public.*

104 Exhibit No. 5.

Memorandum of lease made and concluded this 3d day of July, 1871, by and between C. J. Langdon, of the city of Elmira, N. Y., of the first part and T. E. Brown, of Polk county, Iowa, party of the second part.

Witnesseth: That said Langdon hereby leases to said Brown, the following described premises, situated in the county of Polk, State of Iowa, particularly described in a deed from T. E. Brown and wife to said Langdon, bearing date the 18th day of May, 1871, being all the lands described in said deed for the term of five years from date hereof.

Said Brown hereby hires said premises and agrees to pay for the use thereof all the taxes that shall be levied and assessed thereon during said term, and further agrees to keep said premises in good repair during said term.

The party of the first part reserving the right to sell said premises or any part thereof during the term above specified, and to give possession thereof to the purchaser, and it is agreed that such sale shall terminate this lease as regards the premises sold.

In witness whereof, said parties have hereunto set their hands, the date first above written.

CHARLES J. LANGDON,
T. E. BROWN.

105 Exhibit No. 6.

It is hereby mutually agreed by and between Talmadge E. Brown and J. D. F. Slee and others, executors of the estate of Jarvis Langdon, deceased, that said Brown need not perfect his conveyance to the plantation on White river, in Arkansas, as he is required to do by contract with said executors, dated April 25, 1871, but may in lieu

thereof, transfer and assign to said executors a certain judgment now owned by him against the county of Beuna Vista, State of Iowa, on which there is due to him five thousand ($5,000) dollars for the purposes named in said contract of April 25, 1871, said Brown to guarantee the collection of said judgment.

It is further understood and agreed that if said executors desire it, said Brown shall at the expiration of the five years stated in said contract of April 25, 1871, repurchase the 130 acres of land in the city of Des Moines at $25,000, the same as though the plantation aforesaid was included therein.

And it is further understood that if any of said Buena Vista judgment shall within said five years be paid to said executors, they will allow interest thereon at the rate of seven per cent per annum, and the principal so paid may be deducted from the $25,000 to be paid by said Brown for the re-purchase of the Des Moines property.

In witness whereof, said parties have hereunto set their hands, this 30th day of August, 1871.

J. D. F. SLEE, *Executor,*

106 *and attorney for the executors of the estate of J. Langdon, deceased.*

TALMADGE E. BROWN.

Exhibit No. 7.

ELMIRA, Oct. 30, 1875.

T. E. BROWN, ESQ., *Des Moines, Iowa,*

DEAR SIR:—My wife's health is so poor that I am obliged to go away with her, and I shall sail for Europe Saturday next, for an absence of four, six, or eight months. I have left all necessary papers for the closing of our matters, the re-deeding of the Des Moines land and all other necessary business, with Mr. Slee. The balance of $25,000, less what has been paid on Buena Vista county judgment, will be due April 25, 1876, and we shall desire the money at that time as per contract. Yours truly,

C. J. LANGDON, *Executor.*

107 Exhibit No. 8.

DES MOINES, 26th May, 1876.

CHAS. J. LANGDON, ESQ., *Elmira, N. Y.,*

DEAR SIR:—Your letter to me last fall in regard to the land did not seem to require an early answer, and I have delayed it until now. I shall not be able to pay you the money this year, and propose the following, which I trust will answer your purpose: 25th April '77 $5,000.00, and a like sum on the 25th day of each April following, all unpaid sums to draw six per cent per annum from April 25, '76, the land to remain in your name until all is paid. The last payment would be fractional part of $5,000, of course. This is small interest, but interest must in future be less than it has been, and this is all I get on money that has been due longer than this has to you. There has been nothing paid on the Buena Vista judgment since remittance

to you. The county are trying to have the same set aside for some informality or fraud, and may succeed, but I think not.

Very truly yours, etc.,
T. E. BROWN.

Exhibit No. 9.

DES MOINES, 4 June, '76.

C. J. LANGDON, ESQ., *Elmira, N. Y.*

DEAR SIR:—I am in receipt of your favor of the 31st May. You say the proposition does not suit you. This does not surprise me. I did not think it would. I am very sorry I cannot pay this money and take the land now. You must take such course in the matter as seems to your interest. I do not ask or expect you to be governed by what may seem to be mine. Yours, etc.,

108 T. E. BROWN.

This indenture, made this 25th day of April, 1876, between Charles J. Langdon and Ida C. Langdon, his wife, of Elmira, N. Y., as individuals on their own behalf, and John D. F. Slee, Charles J. Langdon, Theodore W. Crane and Samuel L. Clemens, as executors, and Olivia L. Langdon, as executrix of the last will and testament of Jarvis Langdon, deceased, of the first part, and Talmadge E. Brown, of Des Moines, Polk county, State of Iowa, of the second part, witnesseth, that the said parties of the first part, in considerstion of the sum of twenty-five thousand dollars, to them in hand paid by the said party of the second part, have bargained, sold, remised and quit-claimed, and by these presents do bargain, sell, remise and quit-claim unto the said party of the second part, and to his heirs and assigns forever, all the following described premises, situated in the county of Polk, and State of Iowa, to-wit: lots No. one (1) and two (2) in section No. eight (8), and so much of the northeast quarter of the northeast quarter of said section eight (8) as lies south of Mulberry street in the city of Des Moines; also, so much of lot No. three (3) in said section as lies south of said Mulberry street; also, a strip of land

109 thirteen and one-half (13½) rods wide off the west side of the southwest quarter of the northwest quarter of section No. nine (9); also a strip of land thirteen and one-half (13½) rods wide, and lying south of said Mulberry street in the west side of the northwest quarter of the northwest quarter of said section No. nine (9); also, all that portion of land lying west of Iowa street and north of the south line of what was formerly known as Mulberry street in said city of Des Moines, and bounded on the west by Coon river and on the north by the right of way of the Des Moines Valley railroad, except so much thereof as was deeded by said Brown, July 11, 1870, to the city of Des Moines for the purposes of a street, all being in township No. seventy-eight (78) north, range No. twenty-four (24) west of the 5th P. M., and situated within the corporate limits of the said city of Des Moines, and containing in all one hundred and thirty acres more or less, being the same premises conveyed by the party of the second part to Charles J. Langdon by deed dated the 18th day of May, A. D. 1871,

and recorded on the 8th day of July, A. D. 1871, in book 17, Page 5 of deeds, together with all and singular the hereditaments and appurtenances thereto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title and interest, claim and demand whatsoever of the said parties of the first part, either in law or equity, of in and to the above bargained premises, with the said hereditaments and appurtenances, to have and to hold the said premises to the said party of the second part, his heirs and assigns, to the sole and only proper benefit and behoof of the said party of the second part, his heirs and assigns forever.

In witness whereof, the parties of the first part have hereunto set their hands and seals the day and year first above written.

CHARLES J. LANGDON,
110 IDA C. LANGDON,
JOHN D. F. SLEE,
CHARLES J. LANGDON,
THEODORE W. CRANE,
SAM'L. L. CLEMENS,
OLIVIA L. LANGDON.

STATE OF NEW YORK, } ss.
COUNTY OF CHEMUNG. }

On this 20th day of June, in the year of our Lord, one thousand eigth hundred and seventy-six, before me the subscriber personally came, Charles J. Langdon and Ida C. Langdon, to me known to be the same persons described in, and who executed the within instrument, and severally acknowledged that they executed the same; and the said Ida C. Langdon on a private examination by me, apart from her said husband, acknowledged that she executed the same freely and without any fear or compulsion of her said husband.

JAMES N. WARD,
Notary Public.

STATE OF NEW YORK, } ss.
COUNTY OF CHEMUNG. }

On this 20th day of June, in the year 1876, before me personally came John D. F. Slee, Charles J. Langdon, Theodore W. Crane, and Samuel L. Clemens as executors, and Olivia L. Langdon, executrix, of the last will and testament of Jarvis Langdon, deceased, to me known to be the persons described in, and who executed the within conveyance and acknowledged that they executed the same as such executors and executrix as aforesaid, for the purposes therein mentioned.

(Signed) JAMES N. WARD,
111 [SEAL] *Notary Public.*

Here follows, which is not copied in full, a certificate, clerk Chemung Co., that James N. Ward is a duly qualified notary public.

(Signed) NOURSE, KAUFFMAN & CO.,
Atty's for executors of Jarvis Langdon, deceased.

(Signed) T. E. BROWN,
ANNA L. BROWN,
per T. E. BROWN, *Agent.*

(Endorsed:) Jno. D. F. Slee et al., Exs. of Langdon, vs. T. E. Brown. Stipulation of facts, 736, equity.
Filed May 17, '77.

ED. R. MASON, *Clerk.*

NOURSE, KAUFFMAN & CO.,
Sols. for Complainant.

And afterward, to-wit: on the 19th day of May, 1877, the same being of the May term of said court, there appears of record of the proceedings thereof in said cause, the following entry, to-wit:

United States Circuit Court, District of Iowa, May Term, 1877.
May 19, 1877—Saturday.

112

JOHN D. F. SLEE ET AL.,
vs.
TALMADGE E. BROWN ET UX. } Original Bill. No. 736. Equity.

TALMADGE E. BROWN,
vs.
JOHN D. F. SLEE ET AL. } Cross-Bill.

This cause coming on for hearing, and by consent the demurrer to cross-bill to defendant was re-argued.

And thereupon the Court having further considered the same, and being now fully advised, affirmed the former judgment of the Court, sustaining the demurrer and leave was given the defendants to amend their cross-bill.

Afterward, on the 23d day of May, A. D. 1877, the said respondent by his said solictor, filed in said clerk's office an amendment to his cross-bill in said cause, which said amendment is in the words and figures following, to-wit:

113 In the United States Circuit Court, District of Iowa.

JOHN D. F. SLEE ET AL., ex'rs of JARVIS LANGDON, deceased,
vs.
TALMADGE E. BROWN and ANNA L. BROWN; } Bill.
and
TALMADGE E. BROWN,
vs.
JOHN D. F. SLEE ET AL., ex'rs of JARVIS LANGDON, deceased. } Cross-Bill.

Now comes said Talmadge E. Brown, first having obtained leave of this court so to do, and relying upon each and every allegation in his cross-bill of complaint contained, and files this his amendment to said original cross-bill in this case.

114 The said complainant alleges that at the time of the filing of the original bill herein, as well as at the time of the filing of the original cross-bill herein, the said John S. Baldwin was wholly and hopelessly insolvent, and still continues so to be.

Complainant further alleges that, recently, and to-wit: on or about the 7th day of August, 1876, he obtained a settlement with the said Baldwin, in order to complete all the matters and things between him and the said firm of T. E. Brown & Co., and that the said Baldwin was then and there found to be in fact justly indebted and acknowledged in writing that he was, and is, indebted to the said firm in the amount set up in complainants cross-bill in this cause over and above all claims by him against the said firm, or against the said Langdon as a partner of said firm. And the said Baldwin there and then also executed a release to the firm of Brown & Co., for all claims for profits as against the executors of said Langdon.

115 Complainant further sets up and shows to this honorable court that he has had no opportunity to set off this claim against the said $50,000 of endorsed paper executed by him to the said executors of Langdon, deceased, in part payment for the purchase of said Langdon's interest, as herein set out, for that the same were negotiable and collected by and paid to the indorsees, who received the same before due, and as complainant is informed and believes, and therefore charges the truth to be that they were *bona fide* owners and holders thereof.

And complainant also alleges that he was deterred from attempting to interpose such a defense on account of the matters set up in his original cross-bill; and for the still further reason that at the time there had been no settlement with Baldwin, and no release obtained of his claim for profits, either to Langdon, or the firm of Brown & Co.

The complainant further states that there was also at that time a hope of collecting the same, or a part thereof, from the said Baldwin.

Complainant further states that this claim was Langdon's individual guaranty of Baldwin's debt to the firm, made in writing, and has been repeatedly scheduled by the firm to Langdon and his executors, as a part of the assets of Brown & Co.

116 That subsequent to the making of the original promises of guaranty the same has been recognized by Langdon as still a valid and subsisting obligation, and that Brown & Company, relying upon the said promise to make good the said account, permitted the said Langdon to draw out of the firm large sums of money. That during, or about December, 1868, he took out in cash $59,000.00, and at other times large sums, and that under the partnership contract between Brown and Langdon, Langdon would have no right to withdraw so large an amount of funds, except on account of the large balance in his favor, made up by crediting him with the said Baldwin account.

And that such credit was given him with the distinct and unqualified promise that Langdon should see that Baldwin delivered all of the said lumber at the prices named in complainants said cross-bill. That Langdon's interest in said claim against Baldwin, secured to the firm by Langdon's individual guaranty, was one of the assets for which complainant paid the executors one hundred thousand dollars, and that there was no intimation at the time of the said purchase by

Brown of the executors, either verbal or in writing, that the said executors were to be released from the said guaranty. That at the time of the said purchase of Langdon's interest from the said executors, nearly all of the said firm assets, except the said Baldwin account, were in serious litigation with the city of Memphis, and that the complainant was largely moved to make said purchase on account of the Baldwin claim, which he then regarded as good with the guaranty of Langdon, and extremely doubtful without it

117 Complainant also states that in the then complicated condition of the firm affairs which had been imperilled for Langdon's benefit, as set up in the original cross-bill, that Langdon's interest in the assets of the firm, without the said Baldwin account, so guaranteed, were a grossly inadequate consideration for the one hundred thousand dollars, this complainant paid the executors.

So that your complainant says that any such construction of the contract of assignment by the executors to Brown as that Langdon was to be released from said guaranty, would be grossly inequitable, unjust and oppressive, and contrary to his understanding both of its letter and spirit.

And your complainant further states that the guaranty of said account by said Langdon, was an individual transaction upon his own account and personal responsibility, and had no connection whatever with the business of the firm or with the transactions of the firm.

118 That the said transfer of said account was not, in any manner, an advancement by Langdon, of the capital which he was to furnish the firm, and all of which he had theretofore furnished to the firm. And shortly after such credit was given him he withdrew from said firm, in cash, on account thereof, the entire face of such credit so guaranteed; and it had no connection whatever, with such matter of capital, but the credit to him of said account was made to him upon the partnership books, with a view to conferring on him the right to withdraw from said firm the amount so credited to him, which credit was made by reason of, and in reliance upon said guaranty and not by reason of its being an advancement of capital, or as having any connection therewith. That the guaranty of the said Langdon was always recognized and treated by him (Langdon), as an individual guaranty, made upon his own personal account, and not as any part of the firm's business, or as necessarily or properly connected therewith. That at the time of the purchase of the interest of said Langdon's estate, from his executors as hereinbefore stated, it was believed, or, at all events, there was a hope and a probability that something, at least, upon the balance due from said Baldwin's account, and possibly all might be collec-

119 ted, or in some manner realized from said Baldwin. And that said claim against said Baldwin was spoken of, and was the subject of conversation between the parties at the time of the purchase, and the same was not settled or adjusted or understood to be embraced in the terms of the settlement for the reason among others, of the hope that the same might be realized in whole or in part from the said Baldwin.

And your orator therefore, distinctly avers, as a substantive and existing fact, that the claim upon Langdon's executors, by reason of that guaranty was not embraced in said settlement, nor intended to be im-

braced, but was omitted therefrom for adjustment between the parties in case the said Baldwin should fail to pay any portion of said balance against him.

Your orator therefore prays for leave to file this as an amendment to his original cross-bill, and he prays for the relief asked for in his original cross-bill, and for all other and proper relief.

(Signed) T. E. BROWN, *Complainant.*

120 (Signed) C. C. COLE, *of Counsel.*

UNITED STATES OF AMERICA, }
STATE OF IOWA, POLK COUNTY. } ss.

Subscribed in my presence by Talmadge E. Brown, and sworn to, by him, before me this 23d day of May, 1877, at my office in Des Moines, Polk county, Iowa.

(Signed) T. E. BROWN.

Sworn to, and subscribed before me, this 23d day of May, 1877.

E. R. MASON, *Clerk.*

(Endorsed:) 736 Equity. In U. S. Circuit Court, District of Iowa, John D. F. Slee, et al., executors of Jarvis Langdon, deceased, vs. Talmadge E. Brown and Anna L. Brown. Bill. And Talmadge E. Brown vs. John D. F. Slee, et al., executors of Jarvis Langdon, deceased. Cross-bill. Amendment to cross-bill.

Filed May 23, 1877.

121 E. R. MASON, *Clerk.*

On the same day the said complainant by his said solicitors filed a demurrer to said cross-bill, which said demurrer is in the words and figures following, to-wit:

JOHN D. F. SLEE ET AL., executors of JARVIS LANGDON, dec'd, *vs.* T. E. BROWN and ANNA L. BROWN. } No. 736. Equity. In Circuit Court of United States, Dist. of Iowa.

The demurrer of J. D. F. Slee et al., executors of Jarvis Langdon, dec'd, defendants to the cross-bill of T. E. Brown, as now amended by amendment filed this 23d day of May, 1877. These defendants by protestations, not confessing all or any of the matters and things in the said cross-bill as amended, to be true in such manner and form as the same is therein set forth and alleged, doth demur to said cross-bill, and for cause of demurrer showeth that:

122 1. That as amended, said cross-bill sets out no cause of action or ground for equitable relief against the defendants in said cross-bill.

2. The said cross-bill as amended avers a written guarantee of Jarvis Langdon, deceased, and seeks relief against his executors, but sets out no copy of said pretended guarantee.

3. Said cross-bill seeks a recovery against the executors upon a written guarantee of the deceased as a defense to the claim of the exec-

utors upon an agreement with them for a sale of the assets of the estate to said Brown, and shows no cause of action against said executors over which this court can take jurisdiction by cross-bill, and said claim should be presented to and proved before court of probate.

4. Said cross-bill as amended sets out a written agreement for a sale of Langdon's interests, or the interest of the estate of Langdon to said Brown, which interest was the right of Langdon in the assets after all claims for or against him, of the nature described in the cross-bill, were settled.

5. Said cross-bill shows a written agreement that is an express release and settlement of matters claimed upon in the cross-bill.

6. Said cross-bill as amended states conclusions of law, and avoids statements of facts, and fails to set out the account of Langdon with T. E. Brown & Co., or the facts showing the interest purchased by T. E. Brown.

(Signed) NOURSE, KAUFFMAN & CO,
123 *Solicitors for Deft's to cross-bill.*

I, C. C. Nourse, hereby certify that I am one of the counsel for defendants in the cross-bill of T. E. Brown as filed herein and amended and that in my opinion the demurrer herein filed to the said cross-bill as amended, is well founded in point of law.

(Signed) C. C. NOURSE.

(Endorsed:) Jno. D. F. Slee et al., ex'rs Jarvis Langdon, dec'd, vs. T. E. Brown et al. No. 736. Equity. Demurrer to cross-bill as amended.

Filed May 23, 1877. E. R. MASON, *Clerk.*

NOURSE, KAUFFMAN & CO.,
Solicitors for Defts. in cross-bill.

And afterward, to-wit: On the 26th day of May, 1877, the same being the May term of said court, there appears on the records of the proceedings thereof in said cause, the following entry, to-wit:

United States Circuit Court, District of Iowa, May Term, 1877,
Saturday, May 26, 1877.
124

JOHN D. F. SLEE, executor, etc.,
v.
TALMADGE E. BROWN ET UX. } No. 736. Equity.

This cause came on this day for hearing on complainant's demurrer to defendant's cross-bill. Complainant appeared by Nourse & Kaufman, and defendant by C. C. Cole, and the court after argument of counsel therein being fully advised sustained said demurrer, and said defendant electing to stand on his cross-bill as amended, and refusing to further plead, it was ordered adjudged and decreed, that said cross-bill, be and is, hereby dismissed at defendant's costs. To which decree and judgment the said defendant at the time excepted, and prayed an appeal which was allowed. The cause upon the original bill, answer,

and replication is continued, and time for taking proofs extended to 1st Monday in September, next.

Afterward, to-wit: on the 11th day of September, A. D. 1877, there was filed in said cause a motion which is in words and figures a follows, to-wit:

J. D. F. SLEE ET AL., executors,
vs.
TALMADGE E. BROWN ET UX.

Now comes complainants, and sets the above cause down for final hearing at the coming October Term, 1877.

NOURSE, KAUFFMAN & CO.,
125 *Sols. for Complainants.*

[Endorsed:) 736. J. D. F. Slee et al.

Filed September 11, 1877.

E. R. MASON, *Clerk.*

And afterward, to-wit: On the 30th day of October, 1877, the same being the October Term of said court, there appears on the records of the proceedings thereof in said cause, the following entry, to-wit:

United States Circuit Court, District of Iowa, October Term, 1877, Tuesday, October 30, 1877.

JOHN D. F. SLEE ET AL.,
vs.
TALMADGE E. BROWN ET UX. No. 736. Equity.

This cause coming on this day for hearing on the bill of complaint, answers, replication, and proofs filed. Complainant appeared by Nourse, Kauffman & Co., and defendants by C. C. Cole and J. M. St. John, and after argument of counsel, the court not being sufficiently advised, took the same under advisement.

Afterwards, to-wit: On the 9th day of February, 1878, there was entered of record in said cause the following order, to-wit:

126 United States Circuit Court, District of Iowa.

JOHN D. F. SLEE ET AL., executors,
vs.
TALMADGE E. BROWN ET UX.

This cause having been submitted on final hearing to one of the judges of the court, it is now, this 5th day of February, 1878, *ordered* that the same stand over until the first day of the next May term of the said court, or as soon thereafter as the counsel can be heard for further argument before the full bench upon the following question,

viz.: Whether under the contract the plaintiffs, in order to have the right to compel the defendant to purchase back the land, must, on or before April 25, 1876, not only give notice of their desire or election that he shall do so, but also tender a deed and demand payment; and herein as to the sufficiency of the letter of October 30, 1875, as notice of an election under the contract that defendant shall buy back the land, and the legal effect of the defendant's answer thereto, of May 26, 1876.

The clerk will enter this order and send copy thereof to the solicitors of record for the respective parties.

[Signed] JOHN F. DILLON, *Judge.*

(Endorsed:) No. 736. Slee vs. Brown.
Filed February 8, 1878.

127 E. R. MASON, *Clerk,*

Afterward, to-wit: on the 10th day of June, the same being of the May term, 1878, of said court, there appears in the records of the proceedings thereof in said cause the following entry, to-wit:

In the Circuit Court of the United States, in and for the District of Iowa.

JOHN D. F. SLEE, CHAS. J. LANGDON, THEODORE W. CRANE, SAMUEL L. CLEMENS, and OLIVIA LANGDON, executors of JARVIS LANGDON, deceased, *vs.* TALMADGE E. BROWN and ANNA L. BROWN.	No. 736. Decree.

Now this cause coming on to be heard upon the original bill of complainants and exhibits, and the answer of defendants and exhibits, and the replication thereto, and the stipulation of facts and exhibits filed herein, and the same having been submitted to the court after the argument of counsel, the court having considered the same, it is ordered, adjudged and decreed that the equities of this cause are with complainants, executors of the estate of Jarvis Langdon, deceased.

128 And it is further ordered, adjudged and decreed that the defendant, T. E. Brown, is indebted to the complainants in the sum of twenty-six thousand three hundred and twenty and thirty-seven one-hundredth dollars, amount due, including interest, for the re-purchase by the said T. E. Brown of the real estate conveyed by the said T. E. Brown and Anna L. Brown, on the 18th day of May, 1871, to Charles J. Langdon, one of the complainants, and described as follows:

Lots Nos. one (1) and two (2), in section No. eight (8), and so much of the north-east quarter of the north-east quarter of said section eight (8) as lies south of Mulberry street, in the city of Des Moines; also so much of lots No. three (3) in said section as lies south of said Mulberry street; also a strip of land thirteen and one-half (13½) rods wide off the west side of the south-west quarter of the

north-west quarter of section No. nine (9); also a strip of land thirteen and one-half (13½) rods wide, and lying south of said Mulberry street, in the west side of the north-west quarter of the north-west quarter of said section No. nine (9); also all that portion of land lying west of Iowa street and north of the south line of what was formerly known as Mulberry street, in said city of Des Moines, and bounded on the west by 'Coon river and on the north by the right of way
129 of the Des Moines Valley Railroad, except so much thereof as was deeded by said Brown July 11th, 1870, to the city of Des Moines for the purposes of a street, all being in township No. seventy-eight (78), north of range No. twenty-four (24), west of the 5th P. M., and situated within the corporate limits of the city of Des Moines, and containing in all one hundred and thirty (130) acres, more or less.

It is further ordered and adjudged that the complainants have a lien upon the said above-described real estate for the payment of the sum so decreed and found to be due as for the repurchase of said property as aforesaid.

It is further ordered and adjudged that the said Charles J. Langdon, cause to be filed with Ed. R. Mason, one of the masters of this court a deed in due form, reconveying said real estate to the said T. E. Brown, and that upon the payment by said T. E. Brown to the clerk of this court of the sum here-in-before adjudged and decreed to be due from said Brown to the said executors, together with interest at six per cent from this date and costs of this suit, then the said master of this court is hereby authorized to deliver said conveyance to the said Brown; and in default of the payment of the said sum adjudged
130 to be due as aforesaid, within thirty days from the date hereof, the said real estate, or so much thereof as may be necessary to satisfy the sum herein adjudged to be due to the said executors, together with interest and costs and accruing costs, shall be sold by the master of this court, and the said master, on making sale of the said premises as herein ordered and decreed, shall make and execute unto the purchaser or purchasers of the said lands a certificate containing a description of the property and the amount of money paid by the purchaser and stating that unless redemption is made in one year thereafter, according to the provisions of the statutes of the State of Iowa, governing redemption from sales under execution, he or his heirs or assigns, will be entitled to a deed for the same.

It is further ordered, adjudged and decreed, that if the said property shall not be redeemed from said sale within one year from and after the date thereof, then and in that case, the said master shall execute to the purchaser or his heirs or assigns, a deed which shall convey to the purchaser the legal title in said real estate now vested in the said Charles J. Langdon, and by the deed to be deposited with E. R. Mason, one of the masters of this court, conveying to said T. E. Brown and the said master's deed, approved by this court, shall convey to the purchaser likewise all and singular the right, title and equity of said T. E. Brown in and to said real estate.

131 It is further ordered, adjudged and decreed, that if said property be not redeemed from sale, within one year from the date thereof, as aforesaid, the said respondents and each of them, shall be forever debarred and foreclosed from setting up any right, title or interest, at

law or in equity, in or to the said above described lands or any part thereof, and that upon the delivery of the deed to be executed to the purchaser or purchasers as aforesaid pursuant to this decree, they and each of them, and all persons claiming under them, or any of them, since the said filing of said bill of complaint herein, shall immediately surrender and deliver up to the purchaser or purchasers aforesaid, the possession of the said lands, and every part thereof

132 It is further ordered and adjudged, that E. R. Mason be appointed to make sale of the premises under the decree; and it is further ordered and adjudged, that the complainants have a general execution for any balance remaining due upon this decree and for interest and accruing costs after the sale of the real estate aforesaid.

It is further ordered and adjudged that complainants have and recover of the said T. E. Brown their costs in this behalf expended, taxed at ..... dollars.

It is further ordered and adjudged that the judgment against the county of Buena Vista, Iowa, heretofore assigned by said T. E. Brown to said Charles J. Langdon, shall be held by said executors as collateral security for the payment of the sum adjudged to be due in this decree, and any payments thereon hereafter made to be applied on this decree, and that upon the satisfaction of this decree in full, either by payment or by sale of the property, or both, that said Langdon shall re-assign said judgment to said T. E. Brown.

133 It is further ordered that the said master shall, as soon as the said sale is made, report the same to this court for its action thereon, and that this cause do stand continued until the execution of this decree.

To each and every part of and to all of which decree the defendants in due time and manner objected and duly excepted. And the defendants at the time of the rendition of said decree and in open court duly prayed an appeal to the Supreme Court of the United States from the said decree and every part thereof, and also from the decree rendered by this court on the 26th day of May, 1877, sustaining the demurrer of the complainants, Slee *et al.*, to the cross-bill of the respondent, T. E. Brown, from which an appeal was then duly prayed, and this court now here allows such appeal, and orders that the same shall operate as a *supersedeas* upon the filing with the clerk of this court a bond by said T. E. Brown, in the penalty of $20,000, with one or more sureties, to be approved by one of the judges of this court, and said bond is accordingly filed and approved.

134 [Signed,] JNO. F. DILLON, *Judge.*

Afterward, to-wit: on the 14th day of June, 1878, there was filed in said clerk's office a *supersedeas* bond in said cause, which is in the words and figures following, to-wit:

JNO. D. F. SLEE ET AL., EXECUTORS OF JARVIS LANGDON, DECEASED,
vs.
TALMADGE E. BROWN.

Know all men by these presents: That we, Talmadge E. Brown, as principal, and C. C. Cole, as surety, are held and firmly bound

unto John D. F. Slee and Charles J. Langdon, Theodore W. Crane, Samuel Clemmons, executors of Jarvis Langdon, deceased, in the penal sum of twenty thousand dollars, for the payment of which well and truly to be made, we hereby bind ourselves, our heirs, ex-
135 ecutors and assigns firmly by these presents.

Dated, this tenth day of June, A. D. 1878.

The condition of this bond is such, that whereas the said Talmadge E. Brown has appealed from the decree of the Circuit Court of the United States for the District of Iowa, made at the May term of said court, A. D. 1878, in a certain cause in equity, wherein Jno. D. F. Slee *et al.*, executors, etc., are complainants, and Talmadge E. Brown is defendant, to the Supreme Court of the United States.

Now, if the said Talmadge E. Brown shall pay all costs and damages that shall be adjudged against him, and that he will satisfy and perform the decree appealed from in case it shall be affirmed, and any decree, judgment or order which the Supreme Court may render, or order to be rendered, by the Supreme Court, not exceeding in amount or value the original judgment or order, and all rents or hire, or damages to the property during the pendency of the appeal, out of the possession of which the appellee is kept by reason of the appeal, and all costs and charges that may be awarded thereon by said Supreme Court, then this obligation to be void, otherwise to be and remain in full force.

[Signed,] T. E. BROWN, *Principal.*
136 C. C. COLE, *Surety.*

UNITED STATES OF AMERICA, }
DISTRICT OF IOWA. }

C. C. Cole, surety on the within bond, being duly sworn, deposes and says, that he is a resident and property holder of the State of Iowa, and that he has real estate in the State of Iowa, in his own right, subject to execution, worth the sum of twenty thousand dollars.

(Signed,) C. C. COLE.

Subscribed and sworn to before me, this June 10, 1878.

(SEAL.)

(Signed,) E. R. MASON,
Clerk U. S. C. C., Dist. of Iowa.

736 Equity. Appeal Bond.

John D. F. Sleee et al., executors, *vs.* Talmadge E. Brown.

Approved to act as supersedeas, June 14, 1878.

(Signed) J. M. LOVE, *Judge.*

Filed June 14, 1878, E. R. MASON, *Clerk.*

In the Circuit Court of the United States, for the District
137 of Iowa.

I, Ed. R. Mason, clerk of the said court for said district, do hereby certify that the foregoing transcript contains full, true and complete copies of the pleadings, proceedings, record entries and final decree in a certain cause adjudicated in said court wherein John D. F. Slee, et

al., executors, were plaintiffs, and Talmadge E. Brown, et al., were defendants, as full, true and complete as the originals, of the same now remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at my office in Des Moines, in said District, this 21st day of August, A. D. 1878.

E. R. MASON,

138 (SEAL.) *Clerk U. S. C. C., District of Iowa.*

In United States Supreme Court,

OCTOBER TERM, 1880.

TALMADGE E. BROWN AND ANNA L., HIS WIFE, *Appellants*,

—VS.—

JOHN D. F. SLEE AND OTHERS, *Appellees.*

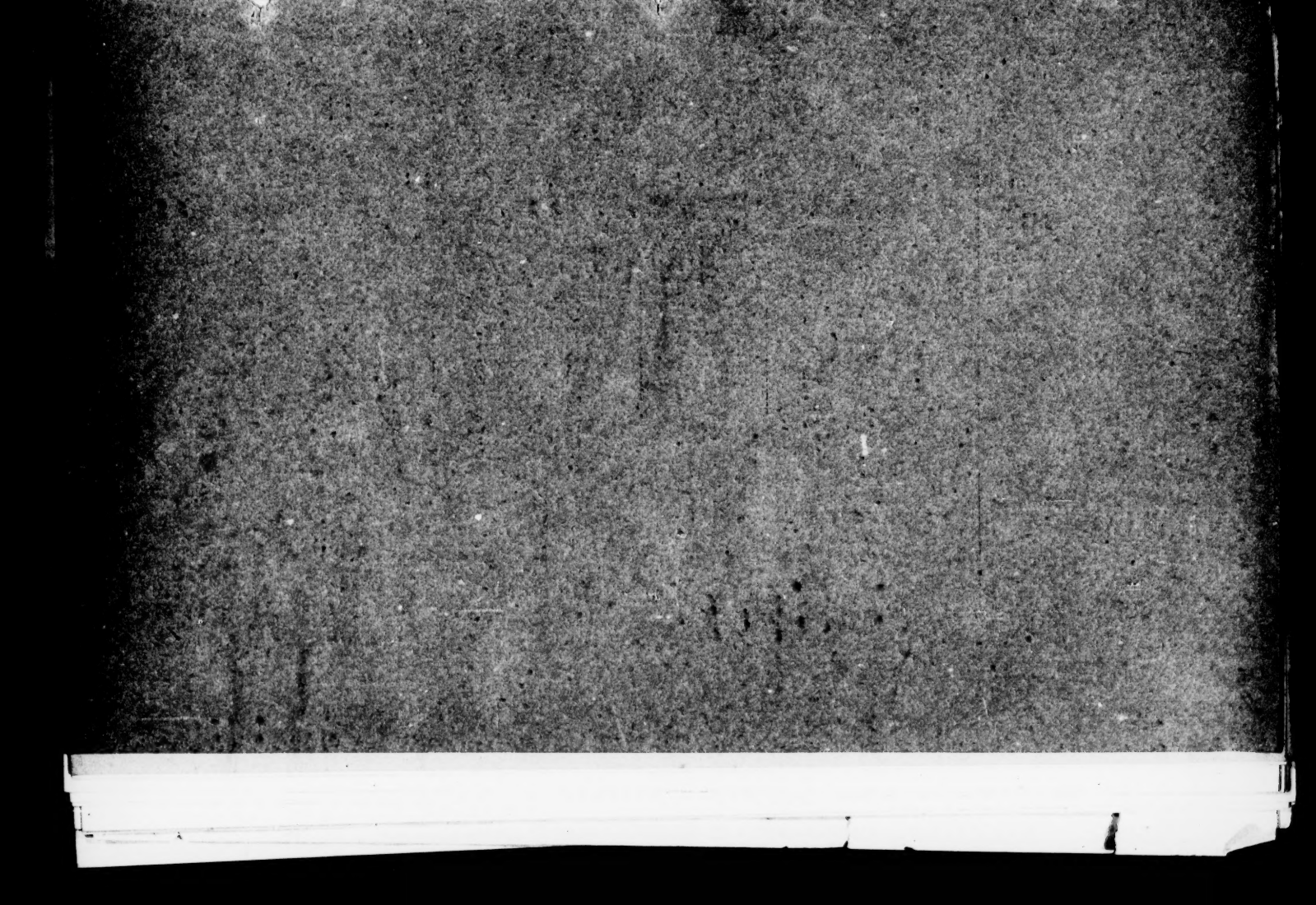
No. 269.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

BRIEF

ON BEHALF OF THE APPELLANTS.

WM. M. RANDOLPH, of Counsel.



In United States Supreme Court,

OCTOBER TERM, 1880.

TALMADGE E. BROWN AND ANNA L., HIS WIFE, *Appellants*,

—vs.—

JOHN D. F. SLEE AND OTHERS, *Appellees.*

No. 269.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

BRIEF ON BEHALF OF THE APPELLANTS.

WM. M. RANDOLPH, of Counsel.

The statement of facts and the assignment of errors will be found in the Brief filed on behalf of the appellants by Hon. George G. Wright and Hon. C. C. Cole, and I respectfully refer to them to save repetition.

The case divides itself into two distinct branches, the one growing out of the matters of the bill, and the other out of the matters of the cross-bill, and they will be treated separately.

The case on the bill was tried on answer, replication and proofs, and the cross-bill was dismissed on demurrer.

The circuit judge seems to have had doubt of the correctness of his decision, as he took the case under advisement the 30th October, 1877, and ordered a reargument on the 5th February, 1878, and decided the cause on the 10th June, 1878.

Record p. 48–49.

I will first notice the case upon the bill.

NATURE OF THE CONTRACT.

The bill treats the contract of 25th April, 1871, Record p. 36–37, as a contract by which Brown agreed to purchase back from the executors of Langdon the real estate described, on the terms stated in the contract. It sets out what it claims was a performance by the executors of Langdon of the conditions to be performed by them before they could demand from Brown the execution, on his part, of the contract of repurchase.

Record p. 4.

It claims, in effect, that by reason of the contract of the 25th April, 1871, and what the executors had done in pursuance of it, Brown had, in fact, in the view of equity, repurchased the real estate, and, therefore, was indebted to the executors in the amount of the purchase money, as agreed upon, and that such purchase money was a lien on the land, and that the land ought to be sold for its payment, and that there should be a decree over against Brown for any balance over and above the proceeds of the real estate. To express the same idea concisely, the bill is solely for the specific performance of the contract of the 25th April, 1871, as modified by the contract of 30th August, 1871, admitting that contract to be only a contract to repurchase.

The decree of the court below, as rendered, carries out the same idea, declaring that Brown is indebted to the plaintiffs in the sum of $26,320.37 for the repurchase by him of the real estate conveyed by him and his wife to Langdon. It then proceeds to provide for

a compliance by Brown with the contract of repurchase, and, in case of his failure, for a sale of the premises for the purpose of paying the purchase money due from him, which is decreed to be a lien thereon. In other words, the court below substantially decreed a specific performance of the contract of repurchase, as made in the contract of 25th April, 1871.

Record p. 49–51.

There is no pretence in the bill or anywhere in the Record that Brown was the debtor of Langdon's executors, except as he became such by repurchasing the property at the desire of the executors, in obedience to the terms of the contract of April 25th, 1871, nor that the contract of April 25th, 1871, taken in connection with the other contracts and the deed from Brown and wife to Langdon of 18th May, 1871, constituted the relation between Brown and the executors, that of mortgagor and mortgagee, or the contract between them, a mortgage.

But if the court chooses to look beyond the construction placed by the executors of Langdon on the contract between them and Brown, it will appear that such construction is the correct one.

The contract as expressed in the assignment or agreement of the 25th April, 1871, was that Brown thereby "agreed that in five years from the date of that contract he would, if the estate or its legal assigns so desired, purchase back the lands for $25,000, paying that sum in cash."

Record p. 37.

That agreement also provided for the vesting of the legal title to the land in the executors of Langdon, free of liens and the claim of dower, and with full covenants for title. In the instrument of 25th June, 1871, the executors acknowledge performance by Brown to the extent that he had delivered the deeds to the real estate.

Record p. 37.

The deed is in the Record, p. 38, and is absolute, purports to convey the entire fee, and contains all the usual covenants, as well as the relinquishment by Mrs. Brown of her right of dower.

It can not be doubted that by the deed Langdon, the vendee, was invested with the complete title to the land. This fact further appears by the provision in the lease of 3rd July, 1871, Record p. 39, whereby Langdon, after leasing the lands to Brown for five years from date, expressly reserved "the right to sell said premises, or any part thereof, during the term above specified, and to give possession thereof to the purchaser," and thereby to terminate the lease.

The agreement of 30th of August, 1871, substituted the judgment against Buena Vista County, for the plantation on White river, Arkansas, and then stated: "It is further understood and agreed that if the said executors desire it, said Brown shall at the expiration of the five years stated in the said contract of April 25th, 1871, repurchase the one hundred and thirty acres of land in the city of Des Moines, at twenty-five thousand dollars, the same as though the plantation was included therein."

Record p. 39–40.

This last agreement, it will be noticed, differs from the provision in the agreement of 25th April, 1871, in two particulars: (1) Brown agreed in the contract of 25th April, 1871, that *in five years from that date he* would purchase back the lands, while in the agreement of 30th August, 1871, he agreed to repurchase, *at the expiration of the five years* stated in the contract of 25th April, 1871. (2.) By the agreement of 25th April, 1871, Brown was to purchase back the land "if the estate or its legal assigns so desired," while by the agreement of 30th August, 1871, Brown was to repurchase "if the said executors desired it."

Now, I insist that one of two propositions is true: Either the language used in the instrument of 25th April, 1871, is to be

understood as meaning the same thing as the language used in that of 30th August, 1871, or else the latter was an intentional change of the former, and the real contract as to the repurchase is contained in the instrument of 30th August.

If I am right in this position, *the time* when Brown was required to repurchase, at the option of the executors, was the end of the five years from the 25th April, 1871, and *the only parties* whose desire Brown was obliged to regard with reference to the repurchase, were the executors—by which I mean *all* the executors of Langdon.

It appears to me to be all-important to determine at the threshold what the contract between Brown and the executors of Langdon should be called. If that contract was a mortgage, then one set of rules must be applied; but if it was a sale, with the right of repurchase, or a conditional sale, as is sometimes said, then another and very different set of rules apply.

In his work on Mortgages, vol. 1, p. 95 (3d ed.), Hilliard says:

"A mortgage and a conditional sale are nearly allied to each other. The difference between them is that the former is a security for a debt, and the latter is a purchase for a price paid or to be paid, to become absolute on a particular event; or a purchase accompanied by an agreement to resell upon particular terms."

And in describing the differences between the two classes of instruments, he says, at page 96:

"The leading incidents of a mortgage, are these: The relation "of debtor and creditor, and the continuance of a debt between "them; retaining of possession by the grantor in a doubtful case; "great excess of value in the property, over the consideration "paid; although this has been held not of itself to raise the pre-"sumption of a mortgage. On the other hand, the necessitous

"condition of the grantor; the connection of a third person with "the transaction; the reservation of a power on the part of the "grantor to annul the bargain, or to the grantee of a right to "buy the land absolutely; the lapse of a long period before any "claim to redeem; the approximation of the consideration paid "to the cash value of the property; the surrender of personal "securities, or the absence of any agreement to repay the pur- "chase money, making the grantor's right to repurchase, and the "grantee's right to recover the price, mutual and reciprocal, are "circumstances which favor the construction of the transaction as "a conditional sale."

The case of Robinson v. Cropsey, 2 Edwards 137, expressly decides that a discharge of the debt shows the transaction to be a conditional sale even though time was given to redeem.

Where an instrument conveyed land absolutely and not as security for money, nor to be held in trust for its repayment, but in lieu of it, this was held to be a deed, and no subsequent event could convert it into a mortgage.

Kearney v. Macomb, 16 C. E. Green Ch. R. 189.

An agreement by a purchaser, subsequent to the deed, to resell at the same price, does not make the transaction a mortgage.

Mason v. Moody, 26 Miss. 184.

The agreement to resell does not make the instrument a mortgage even when the conveyance was for a prior debt. An existing and continuing debt is necessary to constitute a mortgage.

West v. Hendrix, 28 Ala. 227. Hillhouse v. Denning, 7 Conn. 143. Pitts. v. Cable, 44 Ills. 107. French v. Sturdivant, 8 Me. 246. Glover v. Payne, 19 Wend. 518. Galt v. Jackson, 9 Ga. 151. Conway's executors v. Alexander, 7 Cr. 237. 2d Washburne's Real Property, 4th Edition 56.

"And a sale to one for a certain consideration when a clause in "the deed provided that if the grantor should pay such a sum by "a certain time the obligation should be void, but he gave no "obligation to pay, it was held not to be a mortgage, but a sale "with a privilege of repurchase.

2 Washburne R. P. 57.

Where the grantee of land, subject to a limited power of redemption, has not all the remedies of a mortgagee, the conveyance is not a mortgage, but a conditional sale. The court says: "The fair criterion by which the court is to decide whether this "deed be a mortgage or not, I apprehend to be this: Are the "remedies mutual and reciprocal? Has the defendant all the remedies a mortgagee is entitled to? I conceive he has not." The reason given was because in case of foreclosure he had no personal remedy for any deficiency.

Goodman v. Grierson, 2 Ball & Beatty 274.

In Conway's Executors v. Alexander, 7 Cranch 237, the court says: "If the vendee must be restrained to his principal and in- "terest, that principal and interest ought to be secure. It is, "therefore, a necessary ingredient in a mortgage that the mort- "gagee should have a remedy against the person of the debtor."

Mr. Powell, in his work on mortgages, says: "So if the grantee "of lands subject to a limited power of redemption have not all "the remedies of a mortgagee, the conveyance will not be consid- "ered as a mortgage, but as a conditional sale."

1st Powell on Mortgages, Note T to 138*a*.

Where all the clauses of an instrument are consistent with the idea of a conditional sale, and some of its clauses are inconsistent with its being a mortgage, it will be construed the former.

Chapman v. Turner, 1 Call. 251.

The proof must be clear to show the instrument a mortgage.
McDonald v. McLeod, 1 Iredell's Eq. 221.
Scott v. Britton, 2 Yerger 214.

Under the above authorities and many others to the same effect, it cannot be doubted that the instrument of April 25, 1871, simply gave Langdon's executors the right to require Brown to repurchase the land according to its terms. So far as concerned the price of the land, Brown never had been a debtor of the estate. The only relation between the parties was that of vendor and vendee. By this instrument of April 25th, 1871, Brown was given sixty days "to make the delivery and payments described in this contract." Exhibit No. 2, dated June 25th, 1871, page 37 of Record, shows a full compliance. July 3, 1871, the property was leased Brown by the executors of Langdon as owner, as shown on page 39 of Record. As shown by Exhibit No. 6, another agreed arrangement was entered into as to the Arkansas lands, which need not be noticed. Record pp. 39 and 40.

After the complete acceptance of June 25th, 1871, the transaction between Brown and the executors was closed. It would necessarily remain thereafter as it was then, except in the event that the executors, under the permission of the contract of the 25th April, 1871, elected to require Brown to repurchase. Until they did so, however, Brown had no conceivable interest in the land, and was not indebted one cent to the executors. The lease by Langdon to Brown of 3d July, 1871, was in accordance with what has just been said. It declared that Langdon "reserved the right to sell said premises or any part thereof, during the term of the lease, and to give possession thereof to the purchaser, and that such sale should terminate the lease as regarded the premises sold."
Record p. 39.

Evidently Brown was not in the position of a mortgagor, and if he was not, the executors could not be mortgagees, because the

contract between them must necessarily have been a mortgage as to each party, or else a mortgage as to neither of them.

And it need not be argued that after the 25th June, 1871, when performance was completed, the contract, so far as Brown was concerned, was wholly executed, and that thereafter he had no more to do with the title to the land he and his wife had conveyed to Langdon than if he had never owned it.

CONSTRUCTION TO BE PUT ON THE CONTRACT OF REPURCHASE.

If the character of the contract was such as has been argued, that is, if it was a contract to repurchase, and not a mortgage, then the principles applicable to it, as may be seen from authorities already cited, are well defined, and are entirely different from the principles applied to cases of mortgage.

In Davis v. Thomas, 1 Russell & Mylne p. 506, the syllabus is:

"Though, in cases of non-payment of money, the court will relieve against penalty or forfeiture; yet when it is not a question of penalty or forfeiture, but a privilege is conferred upon payment of money at a stated period, the privilege is lost if the money be not paid accordingly."

Almost all the reported cases have arisen out of the attempts of the purchaser to compel the completion of the purchase, but of course the application of the rule is to both the parties alike.

Magoffin v. Holt, 1 Duval (Ky.), p. 95, was a case where the seller sought to enforce the sale, and was very like this case.

The contract for the rescission of a sale, or for repurchase, must be literally performed in order to have the effect of rescinding, or of revesting the title in the original vendor.

McKay v. Carrington, 1 McLean C. C. p. 50.
Robinson v. Cropsey, 2 Edwards Ch. 138.

Hickman v. Cantrell, 9 Yerger, pp. 171, 183–184:

In cases of sale upon condition of repurchase, the tender must be made with all the formalities required by law—at the right time, at the right place, and to the right person; and consequently a sale will become absolute if there be no actual tender, or a tender upon condition that the vendee convey to a different person.

In that case the plaintiff offered to repay the purchase money to the defendant if he would make the bill of sale to one Gleaves, who was present, which the plaintiff refused to do, but expressed a willingness to receive his money and reconvey to the plaintiff, which was not acceded to.

Held, the defendant was not bound to accept the offer, and that there had been no repurchase.

4 Kent's Commentaries, * p. 144, states the law to the same effect. And see

Colcock v. Butler, 1 Dessaussure Chy. p. 307. Poindexter v. McCannon, 1 Devereaux's Eq. p. 377. Doloret v. Rothschild, 1 Simon & Stuart 590. Carter v. Dean of Ely, 7 Simons p. 211. Wells v. Smith, 2 Edwards Chy. 78, and 7 Paige Ch. 22. Benedict v. Lynch, 1 Johnson's Chy. 370. Hatch v. Cobb, 4 Johnson's Ch. 559. Crippen v. Hermance, 9 Paige 211.

Bank of Columbia v. Hagner, 1 Peters 455, held—

To sustain an action at law against the vendee for not accepting the property, the vendor must aver and prove his readiness and offer to perform on the day fixed by the contract for performance. And though the vendee took possession, if the vendor does not offer to perform on the day, the vendee may relinquish the possession, and treat the contract as rescinded.

Stinson v. Dousman, 20 Howard 461, was treated as a case in equity, and there the very same principles were applied, thus showing that, for the purpose of determining whether there has or has

not been a repurchase, courts of equity and courts of law are governed by the same principles.

In many States, as for instance in Tennessee, defendants in executions, or their creditors or assigns, may redeem or repurchase property sold under execution within a certain prescribed time and upon certain conditions. In all such cases, to effect the redemption, or the repurchase, either at law or in equity, the party applying must literally perform all the conditions and pay the money strictly by the day fixed by the law.

Lowry v. McGhee, 8 Yerger 241.
Reynolds v. Baker, 6 Coldwell p. 221.
Hill v. Walker, 6 Coldwell 424.

On what terms did the right to compel a repurchase in this case rest? The contract evidently was that in the event the executors of Langdon elected for Brown to repurchase the land, that he was to have five years from April 25th, 1871, to pay the $25,000 therefor. The language of the contract is "in reference to the "land in Iowa and Arkansas, the purchaser, (meaning Brown I "presume), hereby agrees that in five years from the date of this "contract he will, if the estate or its legal assigns so desire, pur-"chase back the lands for $25,000, paying that sum in cash."

Record p. 30.

As Brown was to pay this $25,000 in five years, it necessarily followed that he had the whole of the five years to pay it in. He could not be forced to pay it sooner. No time is mentioned in the contract except five years and the sixty days given to make the delivery. To give any other construction to the contract than the one contended for would be to say that immediately on its execution the executors could have at once elected for Brown to repurchase the land and pay them the $25,000. It could hardly be contended that the parties were guilty of the absurdity of making a contract by which at one moment Brown conveyed land to the

executors, and at the very next moment they had the right to reconvey, and compel him to pay therefor, $25,000. In the event this $25,000 was ever to be paid, the contract manifestly contemplated that its payment was to be at the end of five years. The contract itself clearly shows this. Besides, the parties, themselves, have practically construed this contract. The lease executed by Langdon to Brown, ran for the whole five years, and the instrument of August 30, 1871, signed by Slee, executor, and Brown, (Record page 40), says: "It is further understood and "agreed that if said executors desire it, said Brown *shall, at the* "*expiration of the five years stated in said contract of April 25, 1871,* "repurchase the 130 acres of land in the city of Des Moines, at "$25,000, the same as though the plantation aforesaid was included "therein." The bill itself, of the executors, on page 2 of the Record, admits the construction of the contract here contended for is the correct construction. In referring to the contract of April 25, 1871, it says: "With the further agreement that the said Brown would purchase back five years from the date of said contract," etc.

Many cases may be found somewhat similar to this one, where time has been held not to be of the essence of the contract, but such cases will be found to be clearly distinguishable from this one. Some of them are cases of mortgage, which stand always upon their own separate theory. Others are cases where the condition is in the nature of a condition subsequent, and not a condition precedent.

In Reese v. Beck, 24 Alabama 651, 660, the slave was dedelivered by Pharr to Mrs. Bell, under a contract that she should keep him during the year 1846, and at the end of that year might elect to become the owner of him on paying $700, or to return him and pay $100 for his hire. In November, 1846, Mrs. Bell expressed her willingness to Pharr's executor, he having died, to take the slave at the $700, and the executor repudiated the contract. Mrs. Bell insisted upon her purchase, and the question was whether in

order to complete it she should have made a tender of the $700 at the end of the year 1846. The court below held the tender necessary. The Supreme Court held the reverse, on the ground that Mrs. Bell had the right to determine at any time during the year 1846, to treat the contract as a sale, and that the end of the year was material only for the purpose of fixing the date of the payment of the purchase money to Pharr or his executor.

The court considered the contract as one of conditional sale, defeasible upon Mrs. Bell's election not to purchase. Her election required only the exercise of her own will. Neither she nor Pharr were required by the contract to do any act when she chose to become purchaser, as a condition precedent to the vesting absolutely of the title to the slave in her. It is true she come under obligation, immediately on making the election to become owner absolutely, to pay Pharr the $700, but he had his right of action at law to recover *that* sum, and its non-payment did not affect the completion of Mrs. Bell's title. Delivery of possession of a slave, with the intention to sell, seems to have satisfied the requirements of the law of Alabama with respect to the vesting of the title, and no formal conveyance was insisted on as necessary in Reese v. Beck.

The distinction between the case of Reese v. Beck and the case in hand is simply the difference between a case where a title is *devested* by the happening of a condition subsequent on which it is made to depend, and the case where the title *never* does vest, because the condition which was to precede its vesting is never performed—in other words, the distinction between a condition subsequent and a condition precedent.

The decision of the case of Reese v. Beck is placed distinctly on the ground that the moment Mrs. Bell elected to become the owner of the slave "the title to the slave vested absolutely in her." Had such not been the result of the election, unquestionably the decision would have been that no purchase of the slave had been completed.

See 24 Alabama p. 661.

Now it is preposterous to contend that any such result followed the letter of Langdon to Brown, of 30th October, 1875, as that attributed by the court in Reese v. Beck, to Mrs. Bell's election to become the owner of the slave. The title to the land was not thereby vested in Brown as purchaser, nor did a present right to demand the payment of the purchase money thereby accrue to Langdon's executors.

In the present case, as Brown had five years to pay the $25,000, this fact stood as a permanent obstacle to any right to have the title to the land changed before the expiration of the five years. The contract evidently contemplated the election to be made at the time when the executors would have had the right to demand the $25,000 of Brown. The letter of the executors to Brown, saying they desired the $25,000 at the expiration of the five years, is an admission they were not entitled to it sooner. Record p. 40. After a valid election had been made, Brown of course would have had the right to demand an immediate conveyance to him of the land. A valid election would have given him rights, capable of enforcement by law, as well as the executors. The latter are therefore placed in this legal dilemma: they must either elect at the end of the five years, or else at some time before the expiration of the five years—the election in this latter case to take effect and operate at once. If an election took place before the expiration of the five years, then on the theory of its being a valid election, Brown was entitled to an immediate conveyance to him of the land. We have already seen from the cases of Goodman v. Grierson, 2 Ball & Beatty 274, and Conway's Executors v. Alexander, 7 Cranch 237, and note T to 138*a*, 1st Powell on Mortgages, and Robinson v. Cropsey, 2 Edwards Ch. R. 138, that an instrument will never be construed a mortgage, where the party would not have all the rights of a mortgagee. In other words, it will not be held a mortgage as to one party to it, and not a mortgage as to the other party to it. This same principle necessarily leads to the conclusion, on the the-

ory that Langdon's executors could elect before the expiration of the five years, that when they did so, Brown would at once have been entitled to a reconveyance. The executors couldn't elect for him to take the land, and then refuse to give immediate effect to their own election. Now this construction of the contract of April 14, 1871, is manifestly wrong, because on this theory, Brown could have compelled a conveyance before he paid the $25,000 purchase money, which is an absurd proposition.

The construction of the contract, that the executors could elect on October 30, 1875, for Brown to repurchase on April 25, 1876, is equally untenable. If they could elect six months ahead of time, they could have done so at the very date of the original contract. The authorities before cited show the election, to be legal, must be one which will give both parties rights. Of course the contract bears the same construction, whether the executors of Langdon or Brown seek its enforcement. Suppose on October 30, 1875, or earlier, the executors had elected for Brown to repurchase April 25, 1876; suppose that the land had become more valuable at the expiration of the five years, or for other sufficient reasons, it was then to the interest of Brown to repurchase at $25,000, and that then it was against the interest of Langdon's estate to allow him to do so. If Brown had claimed that the executors were bound by their election, he would have been met with the objection that the contract gave the whole five years within which to make the election, and the election was not obligatory, because it would not be presumed that the contract contemplated the executors making absolute election before the expiration of the five years, when they could not then possibly tell whether the election they made was for or against the interest of the estate they represented—that the contract did not, in terms, require this construction, and that it could not be legally expected of them to act unintelligently and in the dark. To give the construction invoked by Langdon's executors, for the support of this suit, would have required them to anticipate

results not possible to be known, and where a mistake might have been of serious injury to the estate.

THE LETTER OF LANGDON OF 30TH OCTOBER, 1875.

Assuming, then, that the proper construction of the contract is, that the executors only had the right to elect for Brown to repurchase April 25th, 1876, can any effect be given to their election October 30th, 1875? Certainly not. They must follow the contract exactly. Brown's estate was conditional on the valid election of the executors, and of course the condition was precedent. Mr. Washburne, in his work on Real Property, says: "If the condition "is precedent, inasmuch as the estate does not vest at all until such "condition happens, the effect of its being unlawful or impossible "is, that the estate dependent on it fails, and the grant or devise "becomes wholly void. And when a condition precedent consists "of several parts united by copulative conjunction, each part must "be performed before the estate can vest."

2 Washburne R. P. p. 9, 4th edition.

Mr. Washburne, in drawing the distinction between a mortgage and a conditional sale, says: "In the one, equity interposes, "and disregarding the question of time, grants relief after a fail-"ure to perform by giving opportunity to do so at another time. "In the other, the law only deals with the contract, and requires "the party who would avail himself of the benefit of it to exe-"cute his part with precision and punctuality. In the case of a "mere right to repurchase upon the payment of a certain sum at "a certain time, if there be a failure to comply strictly, all right to "the estate is gone, and there is no such thing as redemption."

2 Washburne R. P. 56.

Kent says, speaking of conditional sales or defeasible purchasers: "And the time limited for the repurchase must be precisely ob-

"served, or the vendor's right to reclaim his property, will be lost."

4 Kent. Com. p. 144.

The terms upon which the repurchase is to take place must be strictly complied with. Where the contract was for the property to be conveyed to a certain party for use of another, a tender by the latter, and demand of conveyance to him were bad, and the right was lost because not insisted on by the right person at the right time.

Galt v. Jackson, 9 Ga. 151.

The time is material.

French v. Sturdivant, 8 Me., 246.

"In the other case of a conditional purchase, the time of per-"forming the condition must be strictly observed."

Robertson v. Campbell, 2 Call 428.

2 Cruise's Digest, Title 15, Mortgage, Ch. 1. p. 74 (38.)

Where the subject matter of a contract is liable to variations in value, time is of the essence of the contract.

Doleret v. Rothschild, 1 Simons & Stuart, 590.

Where a contract for the sale of a city lot contained a provision that the purchaser should on or before a particular day specified, build and enclose a house upon the front of the lot, or that in lieu thereof he should on that day pay to the vendor $1,000 as the first payment toward the purchase money, and the contract further provided that if the vendee neglected or failed to perform any of the covenants therein contained at the time limited for that purpose, all his right or interest in the premises either in law or equity, should cease: Held, that the parties had made the payment at the day an essential part of the contract, and that the vendee who had not attempted to build the house upon the lot and failed to pay at the time specified, was not entitled to decree for

specific performance. It will also be seen from this case that it was necessary for Langdon's executor to have tendered a deed to Brown.

Wells v. Smith, 7 Paige Ch. 22.

Parties may so frame a contract as to make time a material part of it, and it will be enforced. When it is evident the parties intended the purchaser should not have the land unless the money was paid at the day specified in the contract, a different agreement will not be enforced.

Crippen v. Hermance, 9 Paige Ch. 214. Conway's Exrs. v. Alexander, 7 Cr. 237. Benedict v. Lynch, 1 John Ch. 370. Stinson v. Dousman, 20 How. 461.

Strict performance of the condition is necessary in case of conditional sale.

Poindexter v. McCannon, 1 Dev. Eq. 377.

"A sale with an agreement to repurchase, though narrowly "watched, is construed like any independent agreement between "strangers, and the right of redemption restricted to the time "appointed."

1 Hilliard on Mortgages 100.

If a transaction is a sale with agreement to repurchase in a given time, the time is material.

Crane v. Bonnell, 1 Green's Ch. R. 264.

A party bought a tract of land to be paid for in instalments. On the failure of any of the payments, Carrington, by giving notice and paying money into a bank of Virginia, had a right to annul the contract. The court says: "If, in the contract, a particular "mode is provided by which a party may rescind it, as in the "present case, by giving notice and repaying the money received, "it can only be done in the mode provided."

McKay v. Carrington, 1 McLean 50.

"In cases of sale with liberty to repurchase, it is well settled "that the condition must be strictly performed by the day."

Lowry v. McGhee, 8 Yerg. 428.
Scott v. Britton, 2 Yerg. 223.
Hickman v. Cantrell, 9 Yerg. 172.

The last case shows the condition must be *literally* performed.

To same effect are:

Burts v. Evans, 1 Heis. 423.
Bennett v. Holt, 2 Yerg. 5.

It has already been argued that the letter of the 30th of October, 1875, could not operate as a valid election on the part of the executors to require Brown to repurchase the land, because it was not made at the proper time.

There are several other objections to it.

It was not such a complete act as placed it beyond the power of the executors to revoke the election and to retain the title to the land under the deed of the 18th May, 1871.

The land could not be revested in Brown by the letter, nor could he have enforced a right of repurchase against the executors, based upon the letter, because, upon its very face the letter stated that "the necessary papers for the closing of our matters, the *redeeding* of the Des Moines land, and all other necessary business," had been left with Mr. Slee.

In other words, the letter was not itself the election to require Brown to repurchase, as provided in the contract of 25th April, 1871, but understood most favorably for the executors, was simply a notice that at the expiration of the five years, that is, 25th April, 1876, an election would be made requiring him to repurchase, and that the necessary papers for perfecting the election by reconveying the property to Brown were with Mr. Slee.

This is the construction placed by the bill on the letter. It states the letter to have been a notification of election.

Record p. 4.

Now what could Brown understand from this letter but that Langdon proposed that Slee should, at the time appointed, deliver him a proper deed conveying him the land? Langdon certainly used language which meant precisely that, and nothing else.

But, in fact, no conveyance was made or tendered by Langdon or Slee, or any one, before the 26th April, 1876, or on that day, and if such a conveyance was necessary, as all the cases show it was, to put upon Brown the obligation to repurchase, as provided in the contract of 25th April, 1871, then Brown has never been placed under any such obligation.

It is very clear, indeed, that no paper had been left by Langdon with Slee, as stated in his letter of 30th October, 1875, necessary for redeeding the Des Moines land to Brown, as none such is produced, and the deed afterwards tendered purports on its face to be dated 25th April, 1876, and was not acknowledged till the 20th June, 1876, and was not tendered to Brown till the 26th June, 1876.

Record pp. 41--42 and pp. 35--36.

It is scarcely necessary to refer again to the authorities to show that the letter of Langdon of 30th October, 1875, even if it be regarded as a formal notice on the part of the executors that they elected to have Brown repurchase, as provided in the contract of 25th April 1871, could not dispense with the formal tender of the deed by them, to Brown on or before the 25th April, 1876, nor take effect as a conveyance instead of a deed.

That the letter was not a conveyance of the land, nor a tender of a conveyance, is fully admitted by the executors. For they state in their bill, and the agreed state of facts shows that afterwards,

first on the 26th June, 1876, and lastly on the 17th July, 1876, they made a formal tender of a formal deed whereby they undertook to convey the land to Brown. These tenders were, of course, made for the purpose of curing an omission, and the fact that they had been made, is set out in the bill as one of the grounds of the executors' right to relief.

Record pp. 35–36, 41–42 and 4.

Besides, it has already been observed that the contract of 30th August, 1871 limited the right to require Brown to make the repurchase to the executors of Langdon.

Record p. 40.

Such undoubtedly was the meaning of all the parties, as is evidenced by the deed tendered back to Brown, in which all the executors join.

Record pp. 41–42.

Now, there were four executors, namely: Charles J. Langdon, John D. F. Slee, Theodore W. Crane and Samuel L. Clemens, and one executrix, Olivia L. Langdon, making five in all, and there is not one word in the letter of 30th October, 1875, to show that Charles J. Langdon spoke for any one of them but himself, or represented any one of them, or that he, in writing the letter, was acting in his capacity of executor at all. The deed conveying the land had been made by Brown and wife to him as an individual "for convenience," as the agreed state of facts says, Record pp. 35, 38, 39, and Langdon, so far as the language indicates, certainly wrote the letter in his individual capacity, the addition to his name of "executor" being merely *descriptio personæ*.

It will not be denied, I suppose, that, to bind the estate, the election to require Brown to repurchase must have been made by all the executors, or at least a majority of them. Nor, can it be doubted, I presume, that the election, when made, should have been of such a character that Brown could have enforced his rights

under it by a suit at law or in equity against the opposition of the executors. Now, if these positions are correct, can it be maintained that all the executors were parties to or were bound by Langdon's letter of 30th October, 1875? Suppose Brown had written the next day after receiving that letter that he acceded to the propositions of Langdon, and was ready to comply with them, and the matter had remained in that situation till the 25th April, 1876, and thereafter Brown had filed his bill for a reconveyance of the land against all the executors, and they had resisted on the ground that they were not bound by what Langdon had written, could Brown have had a decree? I think not.

It is to be observed that there is nothing in the Record to show that Langdon wrote the letter of 30th October, 1875, on behalf or by the authority of the executors. The bill so states the fact, by inference at least.

Record p. 4.

But it is denied in the answer.

Record p. 11.

And the agreed state of facts says only that Langdon, one of the executors, wrote the letter.

Record p. 35.

HAS BROWN WAIVED A STRICT PERFORMANCE OF THE TERMS OF THE CONTRACT OF REPURCHASE?

He was certainly under no obligation to answer the letter of Langdon of 30th October, 1875, and it is admitted he did not do so until the 26th May, 1876, more than a month after the expiration of the time within which the executors could elect to have him repurchase.

It is very difficult to understand what act or omission of Brown, before the 25th April, 1876, is to be urged as a waiver by him, of

the tender of the reconveyance on that day, required of the executors of Langdon as a condition precedent to their requiring of him the repurchase of the land he had conveyed them.

Brown was in possession of the land as the lessee of the executors, and not otherwise.

Record p. 39.

As for the letter of 26th May, 1876, that was written after the rights of Brown, and those of the executors with reference to the repurchase had become definitely fixed. There is nothing in the letter indicating an intention on the part of Brown to waive anything, or to surrender any ground he then stood upon, and to put that construction on what he said, that is to say, to construe him as agreeing to waive what the executors of Langdon ought to have done, but had failed to do, on the 25th April preceding, in order to oblige him to repurchase the land under the contract of 25th April, 1871, is to put him in the position of voluntarily assuming the burdens of a contract from which he was then, as he knew, entirely free, and which he knew, and in plain words said in the letter itself, he was not able to perform. Now, if a waiver is voluntary, that is, if it must be made with a knowledge of the facts, and of one's rights as they grow out of those facts, and is to be inferred as a matter of intention from the facts, or a course of conduct necessarily leading to that result, I submit the letter contains no evidence, whatever, of a waiver by Brown of anything. It wholly ignored what had transpired, and its sole purpose was to propose a new contract, wholly different from that contained in the contract of 25th April, 1871, which new contract Langdon on his part, promptly declined.

Record pp. 40–41, and p. 35.

The case of the Bank of Columbia v. Hagner, 1 Peters 455, is somewhat in point. A letter was relied on in that case as a waiver, but it was written after the act supposed to have been

waived, ought to have been performed, and the court said it could not possibly be a waiver.

See p. 467. And see

Hatch v. Cobb, 4 Johnson's Ch. 359.

Pitts. v. Cable, 44 Illinois 107.

Stinson v. Dousman, 20 Howard 461.

Other cases lay down the rules that a waiver, to be operative, must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver, must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition.

Ripley v. Aetna Ins. Co , 30 New York, p. 136.

Underwood v. Farmers Ins. Co., 57 New York, 506.

Nothing Brown said in the letter misled or deceived the executors of Langdon, or caused them to do or omit anything whatever affecting their rights under the contract of 25th April, 1871. Therefore, no estoppel works against Brown. A consideration for the letter of 26th May, 1876, or for anything said or proposed in it by Brown; will not be claimed.

In any event, the letter was never assented to or acted upon by the executors, and is entirely out of the case, because it was written as an entirety, and in order to have become obligatory upon Brown, must have become obligatory as a whole upon the executors, which, as a matter of course, they are here denying.

ON THE CROSS-BILL.

Baldwin owed Langdon largely. T. E. Brown & Co. were paving the streets of the city of Memphis under contracts, and there was a probability that the firm could obtain from Baldwin lumber to be used in the paving, and thereby could secure payment of what he owed Langdon. The firm of T. E. Brown & Co. was composed of Brown and Langdon, and Langdon requested the firm to

give him credit for the amount of his accounts against Baldwin on the firm books, being about $87,552.44, and promised, if the firm would do so, he would see that Baldwin delivered lumber enough to be used in the paving to pay the balance due from him on the accounts. The accounts of Baldwin were accordingly credited to Langdon on the books of the firm, and Baldwin delivered lumber to pay a part of the amount due, but a part he did not pay, and the same remains due.

This is substantially what the original cross-bill states.

Record p. 16.

The amended cross-bill alleges substantially that Langdon guaranteed in writing to the firm of T. E. Brown & Co., the payment of Baldwin's debt, that the guaranty is still subsisting, that the debt and the guaranty have always constituted a part of the assets of the firm of T. E. Brown & Co., and have been so recognized by Langdon and his executors, and that Baldwin is wholly and hopelessly insolvent.

Record p. 44.

It is further alleged, both in the cross-bill and the amended cross-bill, that Langdon's executors for value assigned to Brown all the interest of Langdon in the assets of the firm of T. E. Brown & Co., and that such assignment not only included the debt due by Baldwin, but included also the guaranty of the payment of that debt to the firm, made by Langdon.

The demurrer of course admits all the allegations of the cross-bill, and if any fair construction of those allegations discloses a substantial cause of action or suit, the demurrer should have been overruled.

It is settled law, that upon or after the dissolution of the copartnership one partner may lawfully agree that the assets, including the debts due to the firm, shall become the separate property of the

...event, might, if it had been performed, ... and it was not said ... would not possibly be a waiver.

...See p. 207. And see

Hatch v. Cobb, 4 Johnson's Ch. 559.

Petty v. Cable, 81 Illinois 207.

Clinton v. Lousada, 20 Howard 461.

...Where a party knows the facts and waives, ... operative ... must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver, must be such as to estop a party from insisting on performance of the contract or enforcing the condition.

Ripley v. Aetna Ins. Co., 30 New York, p. 136.

Underwood v. Farmers Ins. Co., 57 New York, 500.

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ON THE CROSS-BILL.

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give him credit for the amount of his accounts against Baldwin on the firm books, being about $27,502.44, and promised, if the firm would do so, he would see that Baldwin delivered lumber enough to be used in the paving to pay the balance due from him on the accounts. The accounts of Baldwin were accordingly credited to Langdon on the books of the firm, and Baldwin delivered lumber to pay a part of the amount due, but a part he did not pay, and the same remains due.

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It is settled law that upon or after the dissolution of the copartnership one partner may lawfully agree that the assets, including the debts due to the firm, shall become the separate property of the

other partner, and that such partner may collect and may have the benefit of such assets exclusive of the other.

Cook v. Beech, 10 Humph. 411. Hickerson v. McFadden, 1 Swan 258. Swails v. Coverdill, 17 Indiana 337. Reese v. Bradford, 13 Alabama 837. Story's Partnership, secs. 358, 359, 373 and 396.

If one partner gives to the other his individual note or acceptance for value received on the partnership account, the note or acceptance is valid and collectible.

Gridley v. Dole, 4 New York (4 Comstock) 486.

A firm may negotiate its own paper to one partner, and the latter will thereby become the owner thereof. So a firm may take a separate negotiable security from one of its partners, and hold and use the same for its own purposes.

Baring v. Lyman, 1 Story's R. pp. 397, 423.

And again, a firm may take the note of one of its members, and such note is enforceable at least in a court of equity.

Smith v. Lusher, 5 Cowen 688. Fulton v. Williams, 11 Cushing 108, 110. Thayer v. Buffum, 11 Metcalf (Mass.) 398. Davis v. Briggs, 39 Maine 304. Parsons on Partnership, *p. 288, &c.

And further, a promissory note given by one member of a commercial company to another member, for the use of the company, will support an action at law by the promisee in his own name against the maker, notwithstanding the money, when received, would belong to the company.

Van Ness v. Forrest, 8 Cranch p. 30.

Morrison v. Stockwell, 9 Dana (Ky.) 172.

In Galway v. Fullerton, 17 New Jersey Eq. (2 C. E. Green) 389, the principle announced was that equity will not, by the application of strict technical rules of law, declare void contracts which have

been fairly entered into, and where the ends of justice would be thereby defeated. And the exact point decided was, that a mortgage given by a member of a firm to the firm is valid. It is in no sense a mortgage to himself.

Tested by these authorities, it cannot be considered doubtful that Langdon *could* lawfully make the contract with the firm of T. E. Brown & Co., guaranteeing to the firm the payment of the debt of Baldwin, which Langdon, upon the faith of such guaranty, caused to be entered up to his credit on the books of the firm, nor that Langdon's executors *could* lawfully assign Langdon's interest in all the assets of the firm, including such guaranty, to Brown.

That Langdon *did* in fact make such a guaranty, and that his executors *did* assign it to Brown as a part of the assets of the firm of T. E. Brown & Co., is positively alleged in the cross-bill, and amended cross-bill, *taken together*, and is fully admitted by the demurrer.

If the court looks to the assignment by the executors of Langdon, Record pp. 36 and 37, it is first said, they "sell, assign, set over and transfer to Brown all the right, title and interest of Langdon in or to the undivided property or assets of the late firm of T. E. Brown & Co.," and next, that they "sell, assign and transfer to Brown all the right, title and interest Langdon had in his lifetime in and to the property and assets of the firm of T. E. Brown & Co."

Nothing owned by the firm is excepted from the operation of the assignment. Brown accepted the assignment subject only to these conditions: (1) he took the assets exactly in the condition that the firm held them, and agreed he would assume all the liens and charges thereon; (2) he agreed to pay and discharge all the debts and demands contracted or incurred by the firm or any member thereof, or its predecessors, in the conduct of the business of the firm; and (3) he agreed to assume any claim of any person to a share of the profits of the business of the firm.

Record p. 36.

In construing the language of the assignment, the maxim "*verba chartarum fortius accipiuntur contra proferentem*" applies.

See Broom's Legal Maxims * pp. 529, 532.

The debt Langdon guaranteed was a debt *to* the firm, and not a debt *from* it, or from a member thereof, "for a transaction in the business of the firm in tort or contract," and, therefore, was not one of those liabilities which Brown agreed to indemnify Langdon's executors against.

It may be true that the debt of Baldwin, which Langdon guaranteed, and which thereby became the debt of Langdon, was the debt of a member of the firm of T. E. Brown & Co., but it is *not* true that Langdon incurred the debt in the interest or for the benefit of the firm. He could not possibly do so, because he was the contracting party, on the one side, and the sole contracting party, and the firm was the only contracting party on the other. Speaking with reference to the contract of guarantee, the interests of Langdon and of the firm of T. E. Brown & Co. were wholly distinct, and were diametrically opposed.

If Langdon, by guaranteeing Baldwin's debt, could become the debtor of the firm of T. E. Brown & Co., as we have seen he could, then it cannot be doubted that the debt he so incurred came within the general description, "property and assets," used in the assignment, and passed by it to the extent of the interest of Langdon's executors to Brown.

No strained or unnatural construction, in order to escape this result, should be indulged. On the contrary, the principle is, "*quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba fienda est.*"

Brown's Legal Maxims * p. 552.

Besides, it does not appear by the cross-bill, or the amended cross-bill, that there was any reason why Brown *should* release or

waive Langdon's guarantee of Baldwin's debt, and unquestionably neither of those pleadings alleges as a fact that he did make any such release or waiver.

1 Daniel's Ch. Pl. and Pr. * p. 372 and note 2, (5th Am. Ed.)

The waiver of a legal right, to be available, must be clearly and explicitly shown.

Johnston v. Yale, 19 La. An. p. 212.

A waiver should not be implied from slight circumstances.

Bird v. Hamilton, Walker's Michigan R. p. 361.

The abandonment of an important right will not be presumed by uncertain implication, but ought clearly to appear.

Masson v. Anderson, 3 Baxter 291.

And, again, a waiver, to be operative, must be supported by an agreement founded on a valuable consideration; or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition.

Ripley v. Ætna Ins. Co., 30 N. Y. 136.

Underwood v. Farmers Ins. Co., 57 N. Y. 506.

Among other allegations of the amendment to the cross-bill, is the following:

"That Langdon's interest in said claim against Baldwin, secured to the firm by Langdon's individual guaranty, was one of the assets for which complainant paid the executors $100,000, and that there was no intimation at the time of the said purchase by Brown, of the executors, either verbal, or in writing, that the said executors were to be released from the said guaranty. That at the time of the said purchase of Langdon's interest from the said executors, nearly all of the said firm assets, except the said Baldwin's account, were in serious litigation with the city of Memphis, and that the complainant was largely moved to make said purchase on

of the executors of Baldwin's debt, or Langdon's guaranty of its payment, would be in direct contradiction of the allegations of the cross-bill.

Now, if it is true that the parties had in mind the debt of Baldwin to the firm of T. E. Brown & Co., and Langdon's guaranty of its payment, is not the failure to stipulate expressly in the assignment for the protection of the executors of Langdon against the effect of the guaranty, conclusive proof that no such protection was contracted for, or intended? Is this not a case for the application of the maxim "*expressio unius est exclusio alterius?*"

Brown's Legal Maxims * p. 581 and following.

And, besides, would the court permit proof of intention extraneous the assignment, for the purpose of showing the executors did not intend to transfer to Brown the debt of Baldwin or Langdon's guarantee of its payment? Such proof would undoubtedly tend to add to or modify the terms of the written contract. Because, if it be admitted that Baldwin owed the firm, and that Langdon was the guarantor to the firm of the payment of the debt, such claims necessarily were firm assets, and it must follow that the language of the assignment was broad enough to transfer to Brown the guarantee as well as the debt, and that it has had that effect, unless it was qualified by something else. It does not appear anywhere that any other writing bearing on the subject was ever executed. Indeed, it very plainly appears that *no* other writing was executed. I submit, therefore, (1,) that the assignment must speak for itself, and that no writing, if any existed, not evidencing the contract, could be permitted to vary or enlarge or curtail its expressions; and, (2,) *a fortiori*, that no parol or verbal evidence could be admitted for any such purpose; or, if mistaken in these propositions, (3,) that the court, *on the demurrer to the cross bill*, cannot infer a contract different from the contract appearing in the assignment, and that the demurrer should have been overruled.

WM. M. RANDOLPH,
Of Counsel for Brown and wife.

SUPREME COURT OF THE UNITED STATES.

NO. 269.

OCTOBER TERM, 1880.

TALMADGE E. BROWN ET UX., APPELLANTS,

v. } *Original Bill.*

JOHN D. F. SLEE, ET AL., EXECUTORS, APPELLEES.

AND

TALMADGE E. BROWN, APPELLANT,

v. } *Cross Bill.*

JOHN D. F. SLEE, ET AL., EXECUTORS, APPELLEES.

ON APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

ARGUMENT FOR APPELLANT.

By C. C. COLE and G. G. WRIGHT, } *Of Counsel.*

STATEMENT OF THE CASE.

FIRST, *As respects the cause on the original bill.*

There is no controversy respecting the facts in this case. It is a peculiar and felicitous case, in that there is no testimony of witnesses, the facts are contained in written stipulations of the parties, and the whole controversy rests upon well defined legal propositions.

Prior to August 6, 1870, James Langdon and T. E. Brown were partners in the business of paving streets, &c., under the

firm name of T. E. Brown & Co. One J. S. Baldwin had a contingent interest in said firm, at its organization, but which interest was afterwards forfeited. On said date, (August 6, 1870,) the said Langdon died at his home in Elmira, N. Y., and complainants afterwards qualified in said State as executors of the estate of said Langdon, deceased. On April 25, 1871, the complainants, as executors of J. Langdon, deceased, sold to the said T. E. Brown, by contract in writing, all the interest of said estate in the property of said firm. The only clause of the contract involved in this controversy, is this,—[1]

Said Brown agrees to pay for such interest as follows:

First.—Upon the assignment of the interest above mentioned, twenty-five thousand dollars ($25,000) in cash, together with the further amount of fifty thousand dollars ($50,000) in notes endorsed by B. F. Allen, or other satisfactory endorsers, and running from three (3) to eighteen (18) months, at a fair average time from these extreme points of time mentioned.

Second.—A certain tract of land consisting of one hundred and thirty (130) acres, situated within the limits of the corporation of the city of Des Moines, Iowa, and also a certain plantation situated on White river, in Arkansas, consisting of sixteen hundred (1,600) acres of land, and all the buildings, improvements and appurtenances belonging thereto. In reference to the lands in Iowa and Arkansas, the purchaser hereby agrees, *that in five years from the date of this contract, he will, if the estate or its legal assigns so desire, purchase back the lands for twenty-five thousand dollars* ($25,000), *paying that sum in cash.*

The $25,000 cash was paid, the $50,000 of notes satisfactorily endorsed, were delivered, (and afterwards paid,) and the conveyances of the real estate were duly executed and delivered in accordance with the contract, and the executors conveyed to Brown, the interest of Langdon in the partnership property. Afterwards the parties agreed to exchange or to substitute a certain judgment for $5,000 held by Brown against Buena Vista County, Iowa, for the Arkansas land; which was done. No question, however, arises upon the exchange, and it is only mentioned here to prevent any confusion or misleading that might otherwise occur from the references to it in the pleadings, exhibits and decree.

Some two months after the purchase by Brown of Langdon's interest in the property, and on July 3, 1871, the complainants, as executors, leased to respondent, Brown, the said 130 acres of

(1) Printed record, pp. 36, 37.

land conveyed as aforesaid by Brown to them, in Des Moines, for five years from the date of said lease, which lease contained, among others, this condition:[2]

> The party of the first part reserving the right to sell said premises or any part thereof during the term above specified, and to give possession thereof to the purchaser; and it is agreed that such sale shall terminate this lease as regards the premises sold.

Nothing further occurred between the parties, and all matters remained in *statu quo* until the writing of this letter.[3]

"ELMIRA, Oct. 30, 1875.

T. E. BROWN, Esq., Des Moines, Iowa.

Dear Sir:—My wife's health is so poor that I am obliged to go away with her, and I shall sail for Europe, Saturday next, for an absence of four, six or eight months. I have left all necessary papers for the closing of our matters, the re-deeding of the Des Moines lands, and all other necessary business, with Mr. Slee. The balance of $25,000, less what has been paid on the Buena Vista County judgment, will be due April 25, 1876, and we shall desire the money at that time, as per contract. Yours truly,

C. J. LANGDON, Executor."

The stipulations in this case do not show when this letter was received by Brown. It was, however, probably received by due course of mail and within four days of its date. Nothing further passed between the parties, until the writing of the following letter:[4]

DES MOINES, 26th May, 1876.

CHAS. J. LANGDON, Esq., Elmira, N. Y.,

Dear Sir:—Your letter to me last fall in regard to the land did not seem to require an early answer, and I have delayed it until now. I shall not be able to pay you the money this year, and propose the following, which I trust will answer your purpose: 25th April, 1877, $5,000.00, and a like sum on the 25th day of each April following, all unpaid sums to draw six per cent. per annum from April 25th, 1876; the land to remain in your name until all is paid. The last payment would be a fractional part of $5,000, of course. This is small interest, but interest must in the future be less than it has been, and this is all I get on money that has been due longer than this has to you. There has been nothing paid on the Buena Vista judgment since remittance to you. The county are trying to have the same set aside for some informality or fraud, and may succeed, but I think not. Very truly yours, etc.,

T. E. BROWN.

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(2) Printed record, p. 39. (3) Printed record, p. 40.
(4) Printed record, p. 40.

This letter was duly received by Langdon and he "answered said letter on the 31st day of May, 1876, and declined the proposition therein contained."[6]

Afterwards, and on June 26, 1876, and again on July 17, 1876, complainants tendered to respondent, Brown, a deed for the said 130 acres of land and demanded the payment of $25,000, less a payment received by them on the Buena Vista County judgment; and on the date last above, also offered to re-assign said judgment to Brown.[7]

The tender and demand were declined, and on July 19, 1876, this suit was brought. The Circuit Court, on June 10, 1878, rendered a decree, finding that respondent was indebted to complainants, in the sum of $26,320.37, and ordered the sale of the 130 acres of land as in case of foreclosure, to satisfy said sum.

The respondent appeals.

ASSIGNMENT OF ERRORS.

1. The Court erred in holding that the transaction was a mortgage.
2. The Court erred in holding that the complainants could recover without proof that they had tendered a deed on the day fixed for performance of the contract for re-purchase, to wit, April 25, 1876.
3. The Court erred in rendering a decree for complainants; it should have dismissed the bill absolutely, with costs.

ARGUMENT.

In the argument of this case, it will conduce to perspicuity, for us to discuss the several propositions involved, separately, and in the order they seem naturally to arise upon the record.

I.

The contract sued upon is not a mortgage or security for the payment of twenty-five thousand dollars, but is a contract for the conditional re-sale of the land to Brown.

In nearly every case found in the reports, wherein is involved the question as to whether the contract was a conditional sale, the controversy was between a borrower and a lender. The

(6) Printed record, p. 35. (7) Printed record, pp. 35, 36.

decisions show that a potent influence, in determining whether the contract was a mortgage or a conditional sale, was confessedly given to that fact, in recognition of the proverbial maxim that "the borrower is servant to the lender." And wherever that relation has existed, and the borrower seeks to have the contract declared a mere security for a debt instead of a conditional sale, and the real nature of the transaction is doubtful, it must be conceded that the courts incline to that interpretation of the contract which will give the borrower the right to redeem, as better calculated to attain the ends of justice. But no case can be found in the books, wherein the relation of borrower and lender, or debtor and creditor had not existed, in which the courts have at all hesitated to declare the contract a conditional sale, in accordance with its language, and its manifest intent. In determining, therefore, whether the contract in this case was a mortgage or a conditional sale, it is important to ascertain whether the relation of borrower and lender, or debtor and creditor existed between the parties.

The only business transaction between the parties of which this record affords any information, (and the only one in fact,) is the contract here in controversy. It was the sale by complainants, and the purchase by respondent, of the interest of James Langdon, deceased, in the partnership property of the former firm of T. E. Brown & Co.

That contract, it will be observed, was not a sale and purchase at and for a specified sum of money. It was a sale by complainants, of Langdon's interest in the partnership property, for four specified items of consideration on the part of respondent Brown, to-wit: twenty-five thousand dollars in cash; fifty thousand dollars in endorsed notes; the conveyance of the one hundred and thirty acres of land in Des Moines; and the conveyance of sixteen hundred acres of land in Arkansas. And, as if, in the nature of a guarantee, required and given, that the lands conveyed would be of, at least, a certain value at a certain future time, the following clause was added to the paragraph of the agreement containing the statement of the items of consideration paid by Brown, as follows:—

In reference to the lands in Iowa and Arkansas, the purchaser hereby agrees that, in five years from the date of this contract, he will, if the estate or its legal assigns so desire, purchase back the lands for twenty-five thousand ($25,000) dollars, paying that sum in cash.

There is, therefore, in this transaction, no relation of borrower and lender, or of debtor and creditor. But the record shows that the transaction was a sale by the complainants and a purchase by the respondent, for a consideration paid, and which consideration was rendered more certain or valuable, by the addition of a clause for a conditional sale and re-purchase of a part of the consideration paid and conveyed.

The contract in controversy is, therefore, both by its plain language and by its manifest surroundings, as well as by the relations of the parties, a conditional sale, and not a mortgage or a security for the payment of money.

One other fact may be mentioned, which confirms with added force, the conclusion that the contract was a conditional sale. It is this: Some two months and eight days after the making of said contract, the complainants leased to the respondent the one hundred and thirty acres of land in Des Moines; and in said lease made the following reservation:—

The party of the first part reserving the right to sell said premises, or any part thereof, during the term above specified, and to give possession thereof to the purchaser, and it is agreed that such sale shall terminate this lease as regards the premises sold.

This clause of the lease, establishes, it seems to us, beyond all controversy, that the original contract was a conditional sale, and not a security or a mortgage. For, it is most manifest, that the right of the complainants "to sell said premises or any part thereof during the term," is absolutely inconsistent with the right of redemption, which, if the contract was a mortgage, would necessarily remain in the respondent. The same observation is equally true with respect to that provision of the lease which requires the respondent "to give possession thereof to the purchaser." How could the complainants have "the right to sell said premises" and to require the respondent "to give possession thereof to the purchaser," if the complainants were only mortgagees, and the right of redemption still remained in the

respondent? The bare statement of the question begets its own complete and most unanswerable negation. This lease is one of the attendant facts and circumstances, to be taken into consideration in the interpretation of the contract in controversy; and while it would alone be sufficient to stamp the contract as most unmistakably a conditional sale, it is yet fortified and strengthened by every other fact in the case. They are all in harmony, and confirm, with convincing assurance, that the contract was understood and intended by the parties, as it is, a conditional sale.

A reference to a few of the authorities bearing upon this question, may not, however, be out of place. One of the leading cases in this Court, as we understand it, is the case of *Conway vs. Alexander*, 7 Cranch, 218, (i. e.) 237. The Court, per Marshall, Ch. J., say:—

> To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to purchase the same land at a fixed price and at a specified time, would be to transfer to the court of chancery, in a considerable degree, the guardianship of adults as well as of infants. Such contracts are certainly not prohibited either by the letter or the policy of the law. * * * But as a conditional sale, if really intended, is valid, the inquiry in every case must be, whether the contract in the specific case is a security for the repayment of money or an actual sale.
>
> In this case the form of the deed is not, in itself, conclusive either way. The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but it is a circumstance of no inconsiderable importance. * * * But it must exist in order to justify a construction which overrules the express words of the instrument. Its existence, in this case, is certainly not to be collected from the deed. There is no acknowledgment of a pre-existing debt, nor any covenant for repayment. An action at law for the recovery of the money, certainly could not have been sustained; and if, to a bill in chancery praying the sale of the premises and a decree for so much money as might remain due, Robert Alexander had answered that this was a sale and not a mortgage, clear proof to the contrary must have been produced to justify a decree against him.

In *Robinson vs. Cropsey*, 2 Edwards Ch. 137, after showing that when the relation of debtor and creditor remains and a debt still subsists between the parties, that the instrument must be treated as a mortgage, the Court say: (page 144),

On the other hand, where the debt forming the consideration for the conveyance is extinguished at the time by the express agreement of the parties, or the money advanced is not paid by way of loan, so as to constitute a debt and liability to repay it, but, by the terms of the agreement, the grantor has the privilege of refunding or not at his election, there it must be deemed purchase money and the transaction will be a sale upon condition, which the grantor can defeat only by a re-purchase or performance of the condition on his part within the time limited for the purchase, and in this way entitle himself to a re-conveyance of the property.

This judgment was affirmed by the Chancellor, in *Robinson vs. Cropsey et al.*, 6 Paige Ch. 480.

The case of *Glover vs. Payn*, 19 Wend., 518, was where one person had conveyed certain real estate by deed, absolute, to another, in consideration of seven thousand dollars, and had taken back an agreement in writing, (made at the same time but dated one day later) by the grantee to re-convey in case the grantor should by a day fixed elect to pay eight thousand dollars therefor. The Court, per Bronson J., say:—

The deed of Payn and the lease or agreement were executed at the same time, and it is of no consequence that they bear date on different days. The Judge decided that the two instruments together amounted in law to a mortgage. I think he erred. Judging from the papers themselves, this was simply a sale of land for a consideration paid at the time, with an agreement to re-sell at a future day at an advanced price—the re-sale depending on the election of the original grantor. There were no previous dealings between the parties, and no debt was created by the transaction. It is impossible to maintain, either upon principle or authority, that this was a mortgage. If anything can be made of it but an absolute sale, and an agreement to re-convey at the option of the vendor, it must be by proving facts which cannot be gathered from the face of the papers. Had it appeared that the deed was given to secure a pre-existing debt, or on a loan of money—that the consideration paid for the land was greatly below its real value, or that Payn was under obligation to repay the purchase money—there would have been a question, either at law or in equity, which does not now arise. * * * But when there is no debt and no loan, it is impossible to say that an agreement to re-sell will change an absolute conveyance into a mortgage.

To the same effect, and perhaps even in a stronger view are the cases of

Flagg vs. Mann, 31 Mass., (14 Pick.) 467.
Hughes vs. Sheaff, 19 Iowa, 335.
Rich vs. Doane, 35 Vermt., 125.
Turner vs. Kerr, 44 Mo., 429.

These and many other cases referred to and stated by the learned editors of the American Notes to *Thornborough vs. Baker* and *Howard vs. Harris*, in Leading Cases in Equity, Vol. 2, Part 2, pages 1993–2006 (4th Am. from 4th Lond. Ed. 1876), abundantly establish the doctrine that a conveyance accompanied with a contemporaneous or subsequent agreement to reconvey, is a conditional sale, and not a mortgage, unless the consideration for the conveyance is a loan or debt, or the real object is, either directly or indirectly, to secure the payment of money or other thing.

In this case no loan was made, no debt existed, and no security was intended. The papers themselves do not show any debt, loan or security, and there is not a word of proof *aliunde*, either introduced or offered, tending to show that the transaction was, in fact, any other or different from what it appears to be, by the very language of the writings themselves.

We submit, therefore, that the contract in controversy was a conditional sale, and that the rights of the parties are to be determined by the law applicable to such sales.

II.

The contract being a conditional sale, and unilateral—a mere option and wanting in mutuality—time was of the essence of the contract; and to entitle complainants to any rights thereunder, they must aver and prove, performance or an offer to perform—that is, both an election to sell and the delivery or a tender of the deed on the day fixed for performance.

First: In order to a more clear and correct understanding of this legal proposition, it is well to re-state briefly, the uncontroverted facts whereon the proposition is bottomed.

The language of the original contract is as follows: The purchaser, (Brown,) hereby agrees that *in five years from the date of this contract*, he will, if the estate or its legal assigns so desire purchase back the lands.[1]

If any question could arise as to the proper construction of the language 'in five years from the date of this contract,' it is put at rest by the language of the same parties in their sup-

(1) Printed record, p. 37.

plemental agreement respecting the exchange or substitution of the Buena Vista County judgment for the Arkansas lands. In that agreement the language respecting the re-purchase is as follows: 'It is further understood and agreed, that, if said executors desire it, said Brown shall, *at the expiration of the five years* stated in said contract of April 25, 1871, re-purchase the 130 acres of land, &c."

And to show that there has been no misunderstanding or difference of view as to what was intended by the parties, as respects the time when the election and re-purchase were to be made, we refer the court to the averment in the latter part of complainant's bill, as follows: 'Your orators further show, that said *five years, at the end of which* Brown undertook and agreed to purchase said land for the sum of $25,000, expired on the 25th day of April, 1876."'

These extracts show, beyond any controversy that the parties always understood, what they so clearly stated in their contracts, that the time fixed and agreed upon for the expression of the desire and the performance of the re-purchase, was, *at the end* of the five years from the date of the contract, to-wit: *April 25, 1876.*

It was not a contract giving to the complainants an election to sell or to express their desire *at any time during the five years;* but the contract fixes a specified and particular day on which they were to express their desire, or exercise their election and tender performance on their part. The contract does not give the complainants the right, *at any time prior* to the expiration of the five years, to give notice of their *desire* or to require respondent to re-purchase: but the time for the "desire" and for the re-purchase is at the end of the five years and on that particular day. This is the contract, so plainly expressed in its very words and in its trinity of form as to afford no room for contention.

Goldsmith vs. Guild, 92 Mass., (10 Allen,) 239.

Magoffin vs. Holt, 1 Duvall, 95.

Second.—Having thus ascertained precisely what the con-

(2) Printed record, p. 40.
(3) printed record, p. 4, folio 10.

tract in question was and is, and that it was and is a contract by defendant to re-purchase the land at a specified price, on a certain fixed day, in case complainants should elect to sell; it follows that *time is of the essence* of the contract. For, the rule is well settled, as we understand the law, that "time may be made of the essence of a contract by the express stipulation of the parties; or, it may arise by implication, from the very nature of the property or the avowed objects of the seller or purchaser."

This rule of law, in the very language just stated, was announced by this court in an opinion by Mr. Justice Story, in *Taylor vs. Longworth*, 14 Peters, 172, *i. e.* 174. It has also been re-stated and followed in a large number of cases, among which are

Young vs. Daniels, 2 Iowa, 126, *i. e.* 129.
Rummington vs. Kelley, 7 Ohio, 432.
Scott vs. Field, Ibid, 424.
Benedict vs. Lynch, 1 Johns Ch., 370.
Hatch vs. Cobb, 4 Johns Ch., 559.

The same rule was stated in *Kirby vs. Harrison*, 2 Ohio State Rep., 326, as follows:

> The result of the cases seems to be: 1. That time may be made of the essence of the contract by the express stipulation of the parties. 2. Or, without such express agreement, by the nature of the contract itself, or of the circumstances under which it was made. * * * 3. Although there is no stipulation of the parties that time shall be of the essence of the contract, nor anything in the nature or circumstances of the agreement to make it so, yet it may be made essential by the proper action of the party who is not in default, and is ready to perform, if the other party is in default without justification. * * * (by notice to perform). 4. Although there has been no such express notice, yet, where the party who applies for a specific performance has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay. * * * See also

Hepill vs. Knight, 1 Younge & Collyer, 401 *i. e.* 415.
Parkin vs. Thorold, 16 Beavan, 50.
Tilley vs. Thomas, 3 Law Rep. Ch. App. Cases, 61.
Jennisons vs. Leonard, 21 Wall., 302.
Goldsmith vs. Guild, 92 Mass. (10 Allen), 239.

Here, the very nature of the transaction, as well as the manifest objects of both seller and purchaser, show that time was of the essence of the contract. Indeed, the language of the contract itself, in fixing so unmistakably and by three forms of expression, as above, the particular day for the performance, makes it reasonable to affirm that by the *terms* of the contract itself, time is made of the essence of it.

Third.—And, finally, on this branch of our second main proposition, we confidently submit that time is *necessarily and always* of the essence of a *unilateral contract*, such as that involved in this case.

The learned American editors of Leading Cases in Equity, in their notes to *Seton vs. Slade*, in Vol. 2, part 2d, (Fourth Am. Ed., 1877,), pg. 1129, state this doctrine, and the authorities supporting it, as follows:

> It is universally conceded, that what is commonly called an offer, or in other words, an undertaking to sell if another will agree to buy, is not obligatory unless the promisee signifies his assent *at the time and in the way* prescribed, *ante*, 1081; and the principle is the same where the vendor stipulates for payment, and not for a promise to pay. * * * *Time is therefore necessarily of the essence of a unilateral contract* to convey, if the price be paid on or before a certain day. See
>
> *Kerr vs. Purdy*, 51 New York, 629.
> *Maughlin vs. Perry*, 35 Maryland, 352, 360.
> *Jones vs. Noble*, 3 Bush. 694.
> *Magoffin vs. Holt*, 1 Duvall, 95.
> *Brooke vs. Garrod*, 3 K. & Johns. 608;2 De Gex & Jones, 62.
> *Austin vs. Tawney*, 2 L. R. Ch., App. 143.
>
> Fissler's Appeal, 25, P. F. Smith, 483; see *Estes vs. Furlong*, 59 Illinois, 298, 300.

And the editors conclude their notes under this head, on page 1132, as follows:

> The subject has been complicated by a supposed distinction between law and equity.
>
> It is well settled in *both jurisdictions*, that where a right of property has accrued under a contract, it will not fail through a subsequent default; but that an *executory contract* cannot be enforced by one who does *not comply punctually with its terms*. The difference is, that chancery may, for the sake of the remedy, regard an executory agreement for the sale of land, as executed to the extent of passing the estate. Hence, a delay which admits of compensation is not fatal to the right of specific performance.

But this principle does not apply until the agreement is concluded, *and punctuality is essential*, as it regards all that goes to constitute the agreement. *Unless an offer is accepted at the time, and in the way prescribed*, there is *no obligation* on either side. Here equity follows the law, or rather the immutable principles of logic and good sense which lie at the foundation of jurisprudence. It has *never been held, or even contended*, that where A. writes to say that he will convey, if B. will agree to the terms proposed before the month is out, a court of equity *can relieve* against B's *failure to reply at the appointed time;* and the principle is the same where A. stipulates for payment, as distinguished from an agreement to be answerable for the price. It is immaterial that B. declares his assent, and that he will send the money, when the day arrives, because the acceptance varies from the offer. Notwithstanding any such declaration, the vendor may retract before the money is tendered, and as he is not bound, the purchaser is also free. Where the proposal is to sell for cash, a chancellor has neither the right nor the power to say that the purchaser shall have the estate on credit. To hold otherwise, is to make a contract for the parties by substituting a promise on one consideration, for a promise on an entirely different consideration.

Without here discussing or further quoting from authorities, we submit that those already citec, settle beyond all dispute, the single proposition, that *time is of the essence of the contract* upon which complainants seek to recover. In the *first* part of the discussion of this, our second main proposition, it was, we submit, satisfactorily shown that the time fixed for the performance of the contract of re-sale, *was on April 25, 1876*, and not at *any time prior* thereto.

Fourth.—It only remains for us, in order to establish the entire of this, our second main proposition, to show that before the complainants can have any rights under the contract, they must both aver and prove the manifestation of a "desire" to sell, and (or by) a tender of a conveyance on the day specified in the contract.

The doctrine is elementary, and is fully and clearly established by numerous cases. It is stated by Chancellor Kent, in his commentaries, Vol. 4, p. 144, as follows:

The case of sale with an agreement for a re-purchase within a given time is totally distinct and not applicable to mortgages. Such conditional sales or defeasible purchases, though narrowly watched, are valid, and to be taken strictly as independent dealings between strangers; and the time limited for the re-purchase *must be precisely observed*, or the vendor's right to reclaim his property will be lost.

This statement of the doctrine is so framed as to pertinently

apply where the vendor is desirous of re-purchasing the property he has sold. The same doctrine, precisely, is stated by Addison, in his work on Contracts, page 233, and is so framed as to apply with equal pertinency to persons standing, like the complainants, in this suit, in such position as that they desire to compel the party, agreeing to re-purchase, to perform his contract. Addison states it as follows:

> If the sale is a sale of things of quantity generally, and no right of property in the things agreed to be sold passes by the bargain from the vendor to the purchaser, time will in general be of the essence of the contract so long as the contract remains executory, and the purchaser will not be bound to accept and pay for the goods *if they are not tendered on the day specified.*

The rule is stated by Washburn in his work on Real Property, vol. 2, p. 56 (marg. 492), sec. 14 (ed. 1876), as follows:

> It is sometimes difficult to draw the line of distinction between a transaction which constitutes a mortgage and one where there is a mere right to re-purchase on the part of the grantor upon certain terms. The difference in the effect of these is exceedingly important. In the one, equity interposes, and, disregarding the question of time, grants relief after a failure to perform, by giving opportunity to do so at another time. In the other, the law only deals with the contract, and requires the party who would avail himself of the benefit of it *to execute his part with precision and punctuality.* In the case of a mere right to re-purchase upon the payment of a certain sum at a certain time, if there be *a failure to comply strictly, all right to the estate is gone*, and there is no such thing as redemption in such case.

The Supreme Court of Mississippi restated and adjudicated the same doctrine in *Hoopes vs. Bailey*, 28 Miss., 328, as correctly expressed in the head notes, as follows:

> In conditional sales, the rule is that the vendee must comply with the conditions upon which his right to a conveyance depends, *strictly and precisely*, or his right to the property will be lost. If *a day is fixed* for the performance of the condition, *it must be precisely observed*, and if no time be fixed, the terms must be complied with in a reasonable time.

The following authorities confirm and further exemplify the same doctrine:

Wells vs. Smith, 2 Edward's Ch., 78.
Same case on appeal, 7 Paige's Ch., 22.
Hutcheson vs. Heirs of McNutt, 1 Ohio, 14, *i. e.* 18-21.
Scott vs. Field, 7 Ohio, 424.
Kirby vs. Harrison, 2 Ohio St. 326.

Kemp vs. Humphreys, 13 Ills., 573.
Westerman vs. Means, 12 Penn. St., 97.
Bodine vs. Glading, 21 Penn. St., 50.

In the last two cases, but more especially in the one next to the last, it was also held that time will always be regarded as material, where there are not mutual remedies. The case at bar, is of that class; because it is manifest that Brown could not, under any circumstances, have compelled the complainants to re-sell or convey the lands to him, not even if he had tendered the money in full and demanded a conveyance on the day fixed. He had no right whatever under the contract, to re-purchase, and of course can have no remedy upon the contract or against the complainants. The only right or remedy under the contract was with the complainants, who had the right on the day fixed by expressing the "desire" and by a tender of the deed, to compel the respondent to re-purchase the land. The whole matter depended upon the mere option or desire of complainants, and hence the remedies are not mutual—in no possible state of case could the respondent, Brown, have any remedy whatever.

The cases which hold that in all contracts for conditional sale at the election of one party, it is incumbent upon him to both make his election and perform or tender performance on the day fixed, are not very numerous, but they are perfectly consistent and harmonious in such holding. We call the attention of the court to many of the cases involving the questions and very confidently submit that there are no cases in conflict with them or with the rule as we have above stated it.

The cases are,

Barrel vs. Sabine, 1 Vernon, 268, 1684.
Joy vs. Birch, 4 Cl. & F., 57 *i. e.* 73-4, 1836.
Wells vs. Smith, 7 Paige's Ch., 22, 1837.
Brooke vs. Garrod, 3 K. & Johns, 608, 1857.
Same case on appeal, 2 DeGex & J. 62, 1857.
Perry vs. Meddowcroft, 4 Beavan, 197, 1857.
Lord Ranlagh vs. Melton, 34 Law Jour., Eq. 227, 1865.
Weston vs. Collins, 34 Law Journal, Eq. 353, 1865.

Austin vs. Tawney, 2 L. R. Ch. App. 143, 1867.
Scott vs. Britton, 2 Yerger, (Tenn.) 215 *i. e.* 223, 1828.
Tilley vs. Thomas, 3 L. R. Ch. App., 61, 1867.
Hickman vs. Cantrell, 9 Yerger, 172, *i. e.* 185, 1836.
Magoffin vs. Holt, 1 Duvall, (Ky.) 95.
Jones vs. Noble, 3 Bush, (Ky.) 694, 1868.
Galt vs. Jackson, 9 Ga., 151, 1850.
Corson vs. Mulvaney, 49 Penn. St., 88, 1865.
Stinson vs. Dousman, 20 How. 461 *i. e.* 466, 1857.
Smith & Fleek's Appeal, 69 Penn. St. 474, 1871.
Maughlin vs. Perry, 35 Md., 352, 1871.
Estes vs. Furlong, 59 Ills. 298, 1871.
Kerr vs. Purdy, 51 New York, 629, 1872.

The case of *Barrel vs. Sabine*, 1 Vernon 268, was decided in 1684, nearly two hundred years ago, and it states the substance of the rule as it is claimed by us, and substantially as decided by the subsequent cases above cited. We quote from the report of the case as follows:

The Lord Keeper said he thought that when there was a clause or provision to re-purchase, *the time limited ought to be precisely observed*.

The case of *Brooke vs. Garrard*, 3 K. & Johns. 608, and the same case on appeal, 2 DeGex & Jones, 62, fully supports our proposition. The point adjudicated is accurately and concisely stated in the head-note, as follows:

A testator directed his trustees to offer his real estate, including a moiety of an estate of which he was tenant in common with his brother, to the brother, at a specified sum, but in case the brother should not, within a month after the testator's death, signify his intention to accept the property at the price, or should not, at the expiration of two calendar months from the time of signifying his intention, pay the purchase money to the trustees, then the testator directed the property to be sold by auction. The brother signified his intention to purchase, within the month, and required an abstract of the title. None was furnished to him within two months after signifying his intention to purchase, and the purchase money was not paid at the expiration of that time. *Held*, that the right of redemption was lost.

The Lord Chancellor, in the course of his opinion upon the appeal, uses the following very clear and emphatic language:

Now, I have more than once had occasion to say that I think this court has gone to too great an extent in departing from the precise terms of the contracts

into which parties have entered, and so in effect making other contracts for them. If a contract can, by fair construction, be divided into two contracts, *i. e.*, one contract to do an act and another to do it at a certain time, the court may say that these are independent stipulations. But if the contract be that on payment of a sum of one thousand pounds, at or before a specified day, a certain act shall be done on my part, I am at a loss to see why I can properly be called on to do the act *if the money be not paid at the day;* or why I should be compelled to perform, not my contract, but another contract into which I have not entered. If cases are found in the books which go to that extent, I can only say that I cannot see the principle on which they are founded. No authority has, however, been produced in which this court has varied the terms of a gift under which a benefit is to be taken.

The case of *Lord Ranlagh vs. Melton*, 34 Law Journal, 227, serves to illustrate the difference between an actual contract for the sale and purchase of real estate, and a contract for the privilege or a right to purchase upon certain specified terms. In other words, it illustrates the difference between a *sale* and a *conditional sale*. Because of this, we make more extended extracts from the case, than we otherwise should do:

The articles contained the following proviso: "In case at any time within the space of seven years from the 23d day of June, 1856, the lessees shall be desirous of purchasing the fee simple and inheritance of all or any one of the said plots of ground, and of such their desire, shall give three months' notice to the lessor, and shall, at the expiration of such notice, pay unto him the sum of £210 in respect of each plot mentioned in such notice, and all rent payable to him, including the current quarter, then the lessor shall and will convey the freehold and inheritance of the plot or plots mentioned in such notice, unto and to the use of the lessees, or as they shall appoint."

On the 9th of March, 1859, the lessees assigned all their interest in the five plots of ground to the plaintiffs, and in June, 1862, a correspondence took place between the plaintiff's solicitor and the defendant, which resulted in a notice being served, on the 20th of March, 1863, upon the defendant by the plaintiffs, to the effect that the plaintiffs were desirous of purchasing the five plots, in pursuance of the agreement, for the sum of £210 each, at the expiration of three months from the day of the date thereof. The defendant requested that the draft conveyances should be sent to him; but they were not forwarded till the 1st of July. Some correspondence ensued between the parties, in which the defendant insisted that the plaintiffs had forfeited their right of pre-emption by non-payment of the purchase money on

the day of the expiration of three months' notice, although he expressed himself as being open to terms.

The bill was eventually filed, on the 23d of September, 1863, to compel specific performance of the agreement.

Kindersley, V. C., after stating the facts of the case, said:

Under these circumstances, the plaintiffs insist that they are not bound to pay the £210 for each of the five lots, at the period of the expiration of the three months; but that they may pay after such time, and that this Court will not consider time as of the essence of the contract; and that is the question now to be decided. I apprehend that the rule applicable to these cases is perfectly clear. There is no doubt that if the owner of the lands and a person disposed to purchase from him enter into a contract constituting between themselves the relation of vendor and purchaser, and there is a stipulation in such contract that the purchase-money shall be paid on a certain day, this Court, in the ordinary case, has long established the principle that time is not of the essence of the contract; in other words, that the fixing of a precise day does not put the parties into such a position that either may say, 'If payment is not made on that day, I will not complete.'

On the other hand, it is equally well settled that where there is a contract between the owner of lands and another person, whether he be a lessee or not, that such other person will do a specific act, so that in the eye of this court the parties cannot be regarded as vendor and purchaser until the act to constitute that relation has been performed, as, for instance, an agreement like this: 'If you will pay me, on such day, a certain sum of money, I will convey to you my land,' this Court regards it as a condition on the performance of which the party who claims the benefit of the performance is entitled to certain privileges; but, in order to entitle him to them, *he must perform the condition strictly;* and if the time fixed for the performance of the condition *passes over by one single day*, that prevents his having the right.

The case of *Weston vs. Collins*, 34 Law Journal, 353, is quite analagous to the case last above cited, as well as to the case at bar. The suit arose upon a lease for twenty-one years and was dated September 9, 1842, containing a covenant on the part of the lessor, that if the lessee shall be desirous, at the expiration of the time, of purchasing the premises, and shall give to the lessor six month's notice in writing of such desire, and shall pay two thousand pounds sterling for the purchase thereof, the lessor shall convey the premises. The lessee expended fourteen hundred pounds in improvements upon the premises. In March, 1863, he caused notice of his intention to exercise his option to be prepared and sent in a letter to the lessor at Paris, France, where he was then living. On the 11th day of Sep-

tember, 1863, (two days after the lease expired,) the lessor's solicitor's sent an abstract of title to the lessee's solicitors. Some delay occurred by reason of counsel being out of town. On the 21st day of September, 1863, the lessor's solicitors served notice in writing upon the lessee and his solicitors, that the lessor would be at the office of his solicitors at 12 o'clock on September 29, 1863, to receive the purchase money and complete the sale, and unless the money was then paid, he should refuse to allow the lessee to become the purchaser. Considerable correspondence ensued between the solicitors for the respective parties, the lessee claiming further time, because of delay in delivering abstracts and the lessor refusing to allow it. The money was not paid on the day named in the lease or the notice, and the lessor refusing to convey, the lessee brought this suit.

The Master of the Rolls made a decree for specific performance. The defendant in effect, appealed therefrom, and the decree was reversed.

The opinion was delivered by

The LORD CHANCELLOR. The covenant by the defendant, on which this suit is founded, is so worded as to impose on the lessee, or his assigns, the obligation of doing certain things as precedent conditions to any obligation arising on the part of the lessor. If the lessee chooses to comply with the conditions, the lessor is bound; but previously there is no mutuality of contract; for whilst the lessor is bound to accept the requisition of the lessee, if the conditions are fulfilled, there is no obligation on the part of the lessee to fulfill them, or to avail himself of the lessor's engagement. It is in fact a conditional offer by the lessor, and the condition must be observed before the offer becomes binding. It is a mistake to apply to a stipulation of this kind, the rules which are applicable in this Court to ordinary contracts for the sale of real estate. In ordinary contracts of purchase, both parties are at once bound, and unless there be some special stipulation, or some peculiar circumstances, the time for payment of the purchase money, or for conveyance of the estate, is not deemed of the essence of the contract; but here from the very form of the stipulation, certain things must be done before a binding agreement can arise. If it be clear that any particular act is a condition precedent, it is immaterial whether it be or be not reasonable to require that it shall be first done on the one side before any obligation arises on the other. The things required must be done in the order and sequence which are stipulated. Passing to the construction of the unilateral covenant before me, I think it clear that *the delivery of the notice and payment of the purchase money in the manner prescribed by the covenant* are precedent conditions, to be fulfilled by the owner of the lease before *any contract arises binding the lessor*.

In *Corson vs. Mulvany*, 49 Penn. St., 88, the controversy arose upon the following contract:

> Dr. Hiram Corson hereby agrees that D. H. Mulvany shall dig five shafts for iron ore on the lot of said Corson (describing it) at any time prior to the 1st day of April next, 1864, and if said Mulvany shall desire to purchase said tract of land at that time, at the price or sum of $1,000, he shall have the right and privilege of so doing, the purchase money in that case to be paid as follows: $200 cash on the execution of the deed on the said 1st of April, and the balance of $800 in two years thereafter, with lawful interest, payable annually, to be secured by mortgage on the premises.

The plaintiff took possession of the premises, and dug five shafts; while digging the fifth a bed of iron ore was discovered. On March 28th, plaintiff gave defendant notice in writing that he had and did elect to take and purchase the premises, and that he should call at defendant's residence on April 1st, to pay him the first installment of purchase-money, and place in his hands the bond and mortgage for the balance, in conformity with the agreement.

On the 1st of April, the plaintiff called on the defendant and tendered the sum of $200 in legal tender notes, and a bond and mortgage for $800, the consideration mentioned in the agreement. These were refused. On the trial the $200 in legal tender notes were again tendered, as were also the bond and mortgage, and on refusal by defendant to accept, they were deposited in court for his use.

The Court held the plaintiff entitled to specific performance. The case was tried in the court below, under the peculiar practice in that State, to a jury, and in the Supreme Court, upon errors assigned. There should have been no doubt of the plaintiff's right to recover. He made his election to purchase, on the very day specified in the contract, and on that day tendered the purchase-money. He was within the very words of his contract, and did all that we claim the complainants in the case at bar, and now under consideration should have done. If the plaintiff, Mulvany, had only given his notice of March 28th, and done nothing further, as did the complainant in this action, till about two months after the time fixed for performance, his case would have been very different. He acquired no right and did not advance his claim at all by his notice of March

28th; although he may thereby have shown good faith on his part, and a considerate regard for his vendor. His clear legal right was fully established by his call upon the defendant, and the tender of full performance on his part on the 1st day of April, which was the precise day fixed for performance by the very words of the contract. This was all he was required to do, and his notice of March 28th, was wholly gratuitous and without advantage or prejudice to either him or the opposite party.

It is proper to notice, in this connection, the case of Smith and Fleek's appeal, 69 Penn. St., 474. There the controversy arose upon this contract:

LITTLE COOLEY, May 6, 1868.

For and in consideration of five dollars, lawful money, paid this day, we agree to sell to Raydure & Sons the Rose Pine tract of land, for the sum of six thousand dollars, viz.: Four thousand to be *paid at the time deed is made to said Raydure*, and two thousand in one year. Said land is all that piece bought of Rose by Thomas Smith and Porter Fleek. Said Raydure is to have the refusal ten days from date.

PORTER FLEEK.
THOMAS F. SMITH.

Upon the trial,

The court directed an issue to ascertain the facts in the following questions:

"1st. Whether the defendants agreed with the plaintiffs on the 12th of May, 1868, to meet them at Meadville on the 18th, to receive payment on the contract, and otherwise consummate it?

"2d. Whether, either on the 6th or 12th of May, the defeadants agreed that the plaintiffs might pay Rose the balance due him, and that the deed should be made from Rose directly to the plaintiffs?

"3d. Whether the plaintiffs have performed their part of tl e contract, or tendered performance."

On the trial of the issue the finding was for the plaintiffs on all the points."

It will be seen from the copy of the contract, and of the interrogatories to, and findings by the jury, that the notice of election to take the property was given within the time, and that *within the time limited* by the contract, the parties agreed to meet at a particular time and place to consummate it, and that at such time and place so agreed upon, the plaintiffs did tender performance. Hence there was no question respecting the election and the performance within the time agreed upon; for it will be noticed by reference to the contract, a copy of which is above given, that *no time was fixed in it for the pay-*

ment of the consideration; but that it was to be paid, "at the time the deed was made." Hence, the agreement, as it originally stood, did not make time of the essence for the day of payment, but the contract itself expressly left that open; and upon plaintiff's notifying defendant of their election to purchase, an agreement was made as to the time and place for performance; and the plaintiffs did then and there, not only tender performance, but did actually perform the contract by paying $4,000 to Rose and executing a note and mortgage to the vendors for the two thousand dollars payable in one year and took their conveyance directly from Rose, according to the agreement, as found by the jury.

This case establishes, that an offer to sell or purchase, may, by its express terms, make the time of election or the acceptance of the offer material; and, also, by its terms, leave the time of performing the contract, open and undefined. But in the case at bar, the contract is specific as to both the election and performance—they were to be simultaneous; and the court will mark that in the case now cited, it was distinctly held that tender of performance was necessary. So that the case of *Smith and Fleek's appeal* establishes just what is fatal to complainants, to-wit: that a simple election or notice of a desire, is not enough, but there must be also a tender of performance, or a readiness and willingness to perform on the day fixed by the contract, if any is fixed thereby.

The case of *Austin vs. Tawney*, 2 Law Reports, Ch. App. Cases, 142, fully sustains the same view. Upon examination it will be found that the court held in that case, that the two months allowed for the election to take the property, should be reckoned from the time the award *was communicated* to the son, and that, therefore, the option *was exercised within the time.*

In *Magoffin vs. Holt*, 1 Duvall (Ky.), 95, the court states the contract and its surroundings as follows:

On the 7th day of April, 1857, Magoffin sold to Holt an interest in certain lands in the town of La Crescent, Minnesota, the contract of sale containing this stipulation: 'That if, at the expiration of three years from the date hereof, the said Holt shall desire to sell the said interests herein described and

conveyed, then the said Magoffin, for the consideration aforesaid, upon request made of him by said Holt, will purchase of him the said interests at the price of $3,500, with interest thereon from this date.'

The three years expired on the 7th of April, 1860. Holt failed to request Magoffin to purchase the property until the 2d of May following, when he made the request by letter of that date. Some correspondence ensued between the parties, resulting in the positive refusal of Magoffin to make the purchase. In July following, Holt brought this action to enforce a specific execution of the contract. The Circuit Court granted that relief, and Magoffin has appealed.

The court discusses and decides three distinct questions, each of which is alike involved in this case. First, that the phrase used in the contract, (which is identical with that used in this), to-wit: 'at the expiration of three years,' means, and was intended to mean, the day on which the period of three years expired. The meaning is as clear, we think, (say the Court) as it would be in the case of an ordinary promissory note for the payment of a sum of money, at the expiration of three years from date.

Second, that, while the general doctrine is, that courts of equity will not ordinarily regard time as the essence of a contract, where there has been an agreement for the sale of land whereby an equitable estate is vested in the purchaser which he may sell or devise, and which, like other property, may be subjected to the payment of his debts; yet the contract before the court, is (in the language of the Court,) in every essential particular, wholly unlike those just adverted to. This is not the case of an executory sale of land, investing the parties with mutual rights, and imposing mutual obligations. The contract invested the appellant, (Magoffin,) with no estate or interest in the land whatever; it gave him no right which he could enforce either at law or in equity. It bound him to purchase upon a contingency, but gave him none of the rights of a purchaser. It imposed no liability or duty on the appellee of which the appellant could coerce the performance. What right did it confer on the appellee? Simply the right of electing to sell at the time and in the manner stipulated. By the exercise of this right, he might have imposed on the appellant an obligation to purchase the property at the price agreed on. But he failed to do so. And

by such failure he lost all right to require the appellant to make the purchase, and this because,

Third, when there is a want of mutuality in the obligation, time is essential and indispensible in equity, as well as according to strict and inflexible law.

The court therefore reversed the judgment. The similarity of the contract in the case just cited, with that in this case now before the court, is very marked. In both, the parties purchased the property with a contract for a conditional re-sale; both were clothed with the right, upon *desire*, 'at the expiration of' three (five) years from date, to require the vendor to re-purchase. Both contracts were made in April, and suit brought on each in July. But, in the case cited, the party made his request twenty-five days too late, while in the case under consideration, the request was sixty-one days too late. The case cited is, therefore, we submit, quite conclusive of the case now under adjudication.

The case of *Jones vs. Noble*, 3 Bush (Ky.,) 694, illustrates with very great force and pertinency the rule of law as stated in the second main proposition we are now discussing, and especially the necessity of performance or an offer to perform the contract on the day fixed, in order to entitle the party to enforce it.

Jones agreed in writing, in August, 1863, to sell to Shivell a certain tract of land for two thousand dollars to be paid on a day fixed. He signed and acknowledged a deed accordingly; he did not deliver the deed, but kept it in his possession, and gave to Shivell the written agreement. After the time fixed for the payment of the consideration had passed, Jones sold the land to one Reese for five hundred dollars more than he had contracted to sell it to Shivell for. The suit was brought by Shivell's personal representative, (he having meantime deceased,) to enforce the delivery of the deed, and the cancellation of the deed to Reese, or if that could not be done, then for a judgment for the five hundred dollars received for the land over and above the contract price to Shivell. The court, in its opinion, further states the contract and transaction as follows:

This instrument of writing is to certify that I have this day sold to J. R. Shivell a certain tract of land described in a deed, which has been duly acknowledged in the Henry County Court Clerk's office, which deed is now in my possession, and which is to be delivered to said Shivell, on the payment of two thousand dollars, on the 25th of December, 1863.

J. B. JONES.

It is alleged that Shivell died about the 1st of November, 1863, and, in consequence thereof, the purchase price was not paid or tendered to Jones on the day specified for payment; but that in a reasonable time thereafter the money, with the interest accrued, had been tendered to him, and the delivery of the deed demanded; that he refused to receive the money and to deliver the deed. * * * The Circuit Judge was of opinion that Shivell acquired, by the writing sued on, an equitable title to the land; but as the subsequent vendees had acquired the legal title without notice of his equity, he could not therefore adjudge a specific execution, but rendered judgment against Jones for five hundred dollars, the amount he sold the land to Reese for, more than Shivell was to pay him for it, and Jones now seeks to reverse that judgment. * * * But another reason quite sufficient may be stated why the relief could not be granted, even admitting that there was a contract binding between the parties: the sale was a conditional one, the payment of the price being a precedent condition to the conveyance and surrender of the possession of the land; *time, therefore, was of the essence of the contract*, and appellees could not recover *without performance of the condition precedent*. Wherefore the judgment is reversed.

It will be observed that the contract does not, in express words, declare that time is of the essence of it; nor was there any unreasonable delay in the tender of performance; and there seems to have been a strong excuse—the death of the party, an act of God—for even the reasonable delay. But since the contract did not actually pass or vest any right, but only, (like the contract in the case at bar,) provided that upon the doing of a certain act, a right should arise, the failure to do, or offer to do the act at the time, did not work *a forfeiture*, but simply left the party in the condition he was in, and without acquiring the right he might have secured if he had done or offered to do the act at the time and in the manner specified. The whole law of such cases may be compressed into a single sentence—an agreement for a privilege to buy or sell upon the doing of a specified act at a fixed time, and which privilege ceases if the act is not done or offered as agreed, but if done, then and not till then, does any *right* arise.

In *Maughlin vs. Perry & Warren*, 35 Md., 352, the contro-

versy arose upon a covenant in a lease for three years, renewable for a like period, (and which had been renewed), made by Wells to Hyson, and which had been assigned by Hyson to Perry & Warren. Wells, in consideration of $1,600, sold and conveyed the land with notice, to Maughlin, and afterwards died, during the term of the lease. *Six days before the expiration of the lease*, Perry & Warren filed their bill in equity averring *their acceptance of the terms proposed* in the covenant, and their readiness to pay, and *offering in the bill to pay the money*, and praying for a specific performance of the covenant in the lease. The court holds that the filing of the bill and the offer to pay the price stipulated, *within the time fixed*, was a substantial compliance with the terms of the covenant.

The court, in their opinion, set out the covenant and employ language in respect thereto, as follows:

> And the said party of the first part, for himself, his heirs and assigns, doth hereby covenant and agree with the party of the second part, his heirs and assigns, to sell and convey unto the party of the second part, his heirs and assigns, the above described property and premises, for the sum of fifteen hundred dollars, *at any time before the expiration* of this lease or tenancy.

Courts of equity do not, ordinarily, regard time as of the essence of a contract, but will enforce it when there has not been a literal compliance with the terms, without inexcusable *laches* of the party insisting upon its performance. *This is the case where the rights and remedies are mutual*, courts of equity rather inclining to uphold than to forfeit contracts, where there has been no culpable negligence, and where they can do full justice between the parties. But where there is *a want of mutuality* in the obligations arising from the transaction, *time is essential as well in equity as at law*, because it is not the province of a court of equity more than a court of law, to relieve parties from a substantial performance of their contracts. * * * Where it is manifest the parties have contracted with reference to time, and that constitutes one of the elements of the contract, a court of equity, as well as law, will carry out the contract accordingly.

Under the circumstances of this case we think *the time material*, and that the tenant was *bound to make his election* whether he would or not purchase the property *before the lease expired*; but as to the payment of the money after Wells had made another sale, and had died, it was especially proper, in order to procure such a title as Wells had contracted to give him, that he or his assignees, should, *within the prescribed time*, invoke the aid of a court of equity, as has been done in this case.

The circumstances referred to, after the execution of the contract, rendered such a step advisable, and certainly afford a sufficient excuse for the non-pay-

ment of the money, after they had accepted the terms proposed, and *tendered themselves ready to pay* in the manner indicated.

This case exemplifies in a forcible light the duty of a party having the privilege of an election to purchase, to *both make the election* and perform, or *tender performance of the contract, within the time prescribed.* Without doing *both*, he can acquire no right under the privilege. It was contended, in the case just quoted from, that the purchaser had only made the election to purchase, but had not performed the offered contract on his part, by paying the purchase price also, and therefore no right, under the contract, had been acquired. The court, in effect, concede this proposition of the appellant, and hold that the sale and conveyance to another by the vendor, and his subsequent death, together with the bringing of the suit, and *the offer to pay within the time prescribed*, was "such a substantial compliance with the terms of this covenant, as to entitle the complainants to a specific performance of the contract on the part of the lessor and his assigns." (top of page 357.)

A mere election to purchase is not enough; nor is actual performance requisite. But an election and a readiness and offer to perform—a tender of performance, must concur in order to create a right to a specific performance, as against the other party.

To the same effect are

Scott vs. Britton, 2 Yerger (Tenn.) 223.
Hickman vs. Cantril, 9 Ibid. 171, *i. e.* 183.
Galt vs. Jackson, 9 Geo. 151.
Estes vs. Furlong, 59 Ills. 298.

The case of *Goldsmith vs. Guild*, 92 Mass. (10 Allen) 239, exhibits as strict an enforcement as can be found in the books, of the doctrine that time will be regarded, from the circumstances surrounding it, as of the essence of a contract, when not made so by its express words, and also of the necessity for a prompt and literal compliance, in order to secure any rights under it. We make the following extracts from the statement of the case and the opinion:

Bill in equity to enforce specific performance of a written contract by the

defendant, dated March 19th, 1864, but not delivered or signed till March 22d, to sell an estate in Boston to the plaintiff, "by good and sufficient deed, with covenant of special warranty against all persons claiming through or under" the defendant, "papers to pass within ten days." * * *

The stipulation which gives rise to the present controversy is in the following words: "Papers to pass within ten days." It appears that the defendant did, within ten days from the *date* of the instrument, prepare a deed for delivery according to the terms of the contract. On the 31st day of March, the plaintiff tendered performance on his part, and demanded the deed. The defendant refused to deliver it at that time, on the ground that the tender was not seasonably made. Reckoning from the *date* of the instrument, and excluding the day of the date, the defendant's position, that the tender was not seasonably made, is right. But though it bears date March 19th, it was *not signed* and delivered till the 22d; and the tender was made *within ten days* from that time. The plaintiff contends that the ten days began to run at the time of the delivery, and not at the day of the written date. * * *

The phrase "within ten days" obviously means ten days from the date. * * And we cannot doubt that time was not only an essential part of the contract in fact, but that it was so regarded by the parties when they made their concontract. Bill dismissed.

While the court does not directly pass upon the question, as to whether, by the contract, an equitable right or interest became vested in the vendee, the plaintiff, yet it seems probable that such was the case. If so, it makes the decision still more forcible for the appellant in this case, since the right or equity of a purchaser is much higher and stronger than the privilege or claim of a party holding a mere option or election to purchase. In any view of the case, it shows the necessity of both an election and a tender of performance on the very day fixed, in order to give the party any right in a court of equity, to a specific performance. The plaintiff, Goldsmith, it will be observed, was only *one day* too late in making his tender, even when the time is calculated from the *date* of the contract. The one day was fatal to his right.

The case of the *Iowa R. R. Land Co. vs. Mickel*, 41 Iowa, 402, is equally as strong as the case last above cited; and being the settled law of the State where the contract now in question was to be performed and in the courts of which it was sought to be enforced, the case itself is fairly conclusive against the complainant's claim, and entitles the appellant herein to a reversal.

In the case of *Kerr vs. Purdy*, 50th Barb., 24, the question arose upon a contract of lease made by Purdy with Kerr, whereby the latter was to have the premises in question, at the yearly rental of six hundred dollars, payable half yearly in advance, for five years from April 1, 1859, and for another term of five years on the same terms, if Kerr so desired. "And also with privilege on the part and behalf of the said party of the second part (Kerr,) or his assigns, at any time during the three first years of said term, to purchase said premises by paying said party of the first part all arrearages of rent then due, and the sum of ten thousand dollars." The Supreme Court held that Kerr had the right to maintain his action for specific performance, although there was no strict tender made within the time specified in the contract; that if the plaintiff had failed before suit was brought, to make a sufficient tender or offer, that may be taken into consideration in equitably adjusting the costs, and that time is not so much of the essence of the contract as to bar the right. An appeal was taken to the Court of Appeals from this decision, and the same case is reported in *Kerr vs. Purdy*, 51st New York, 629, as follows:

This was an action for specific performance. Plaintiff's complaint alleged, in substance, that George W. Purdy leased to George A. Kerr certain premises for a term of five years, the lease containing a clause giving the lessee the privilege of purchasing at any time within the first three years, by paying all arrears of rent and ten thousand dollars; that Purdy died intestate, leaving a widow and five children, his heirs at law; that plaintiff, as Kerr's assignor, purchased the shares of two of the heirs, and before the expiration of the three years tendered to the other heirs, the defendants, their shares of the stipulated purchase price and of the rent, and requested a deed, which was refused, etc. Plaintiff asked that said heirs be compelled to deed their interest.

Upon the trial it appeared that plaintiff was in arrears for rent, and did not make a tender, as alleged, but did make arrangements to procure the money, and before the expiration of the three years *notified defendants that he intended to purchase* their respective shares, and requested deeds of the same. Defendants, on being advised that he had not the money, refused to convey. Aside from the widow's dower right, the premises were incumbered by a mortgage of $800. The referee decided that the plaintiff was not entitled to the conveyance sought, and the general term reversed the judgment upon the ground that, as the property was incumbered by the dower rights and mortgage, a strict tender was not necessary. *Held*, that the right to purchase was dependent upon the action of Kerr within the three years; that the lapse of that time without a compliance with the conditions terminated the privilege; and that,

as plaintiff did not make a claim in her complaint that a non-compliance with the conditions was excused by the incumbrances, but, on the contrary, based her claim for relief upon the assumption that the heirs could give the title to which she was entitled, the existence of those incumbrances does not excuse the neglect to make the tender.

This case is equally conclusive upon the case under consideration. Kerr *gave the notice* of his election to purchase *before the expiration* of the three years, and requested deeds to be made out. He had actually purchased the interest of some of the heirs therein, but he did *not tender performance*, nor show his readiness or willingness to perform on or before the expiration of the time limited. For this reason he was denied a specific performance.

In the case now under consideration, the complainants claim that they gave notice of their desire or election before the expiration of five years, but they did not tender performance, nor have they shown a readiness and willingness to perform within the time. The only essential difference between the case last cited, and the one under consideration, is that in the case cited, Kerr had "any time within the first three years" to elect, and did elect within that time, while in the case under consideration, the right of election was confined to a single day, and no sufficient election even, as we claim, was ever made. But, it is equally clear that it was the duty of the complainants *not only to elect* to sell, but *to tender a deed*, or show their willingness or readiness to perform on the day specified. This was not done in the case cited, nor has it been done in this case.

To show that even if this had been a case of actual sale, instead of an option, it was the duty of the complainants to tender, or at least to aver and prove their readiness and willingness to perform on the day specified, we call the attention of the Court to the case of *Scott vs. Shepherd*, 3 Gilman 483, the point in which is correctly stated in the head-note, as follows:

No rule is better settled than that a party cannot compel the specific performance of a contract in a court of equity, unless he shows that he himself has specifically performed, or can justly account for the reason of his non-performance.

The same point is also clearly and directly decided in *Stow*

vs. Russell, 36 Ill., 18, and as correctly stated in the head-note, as follows:

> A party cannot compel the specific performance of a contract in a court of equity unless he shows that he himself has specifically performed all the acts which formed the consideration for the undertaking on the part of the defendant, or can justly account for his non-performance."

In the case at bar the consideration for the promise by Brown to buy at the price of $25,000, was not simply the expression of a "desire" on the part of the executor that he should purchase, but it was in consideration of their conveyance to him of the property. That act of conveyance, which formed the consideration for Brown's undertaking, has not been done or tendered by the complainants in this case; hence, they have no right of action.

In the *Bank of Columbia vs. Hagner*, 1 Peters, 461, the doctrine, as correctly stated in the head-note, is as follows:

> The contracts of vendor and vendee are construed to be dependent, unless the contrary intention plainly appears.
>
> To sustain an action at law against the vendee for not accepting the property, *the vendor must aver and prove his readiness and offer to perform on the day fixed* for the performance.
>
> Though the vendee take possession, if the vendor does not offer to perform on the day, the vendee may relinquish the possession and treat the contract as rescinded.

These cases show the necessity of both giving the notice of the election and of performing whatever was to be performed by the party giving the notice, within the time fixed, before he would have a right to compel the other party to do what he had agreed to do. It does not make any difference whether the act to be done by the party seeking to enforce the contract, is the *payment of the money* or the *making of a conveyance.* If the vendor is seeking to enforce the contract, it is his duty to tender a deed, or offer to perform, and upon such offer, to demand payment of the money. If it is the vendee who is seeking to enforce the contract, then he must show that he tendered or offered to pay the money upon the making of the conveyance. Neither the vendor nor the vendee is compelled to part with his property, whether land or money, until the consideration thereof is assured to him. The position of the ven-

dor is no better or worse, either in law or equity, than is the position of the vendee.

If the vendee would seek to enforce his contract of purchase, he must show a tender, or readiness and willingness to pay the money at the time specified. If the vendor seek specific performance, he must show a tender, or a readiness and willingness to make the conveyance at the time specified. The rights of the parties and their duties are exactly the same, *mutatis mutandis*.

The difference between cases of ordinary contracts for the sale and purchase of real estate, where the vendor, in consideration of money paid and thereafter to be paid by the vendee, agrees to convey the same, and contracts for a conditional purchase or sale at the election of one party only, is very marked. In the former, the purchaser, by the contract itself, acquires an equitable title to the real estate, and the seller acquires an equitable right to the purchase-money, and either may, without regard to time, (unless barred by a statute of limitation) enforce performance by the other. If the action to enforce such performance, is at law, as upon a note for the purchase money, the vendor must, before bringing his action, tender a deed in performance of his contract, otherwise he cannot maintain his action at law.

School Dist. vs. Rogers, 8 Iowa 316.
Berryhill vs. Byington, 10 Iowa 223.

But, if the suit to enforce performance is in equity, then a failure by the plaintiff to tender performance, by offer of payment or otherwise, before suit brought, will not defeat the action, but the court of equity will compel the plaintiff to pay the costs and submit to such other consequences as shall be equitable, as a condition to the grant of a decree for specific performance.

Winton vs. Sherman, 20 Iowa 295, and cases cited.

The reason is, that the tender of performance in such cases, relates, not to *the right*, but to *the remedy*, and since a court of law has not the power to mould with plastic hand its judgments to the

varied and unequal rights of the respective parties, but only to adjudge the payment of such a sum of money, or the delivery of such an item of property, the party seeking such recovery must have done, before suit brought, every act requisite to entitle him to the remedy he seeks, and if he has not so done, his action must fail. But if the suit is in equity, that court, by reason of its plenary plastic power, may mould and adapt its decrees and orders to the actual equities of the parties, and may require a plaintiff to perform, in court, his contract, and to pay all costs prior thereto, as a condition precedent to the granting of a decree requiring a defendant to perform on his part.

But a contract for a conditional sale or purchase of real estate at the desire or election of one party only, does not vest any equity or right in or to the real estate in the proposed purchaser, or any claim to the purchase price in the seller. No such equity or right attaches until the election is actually made; and then the right arises or results from the doing of the act which is to constitute the consideration for the reciprocal act of the conditional contract. Hence, the party having the election, must exercise it, and perform the act constituting the consideration in the time and manner specified, in order to clothe himself with any right or to cast any obligation upon the other party. The performance or tender of performance, is necessary in order to create any right whatever under the contract. For, as we have seen, no right is vested by the contract, but only a privilege in one party, to thereafter, in a particular time and manner make a contract, and until the contract is made in the time and manner specified, there is no contract. If there is no contract, then, of course, no right has vested, and no remedy can be granted. A tender of performance, therefore, in an optional contract, is essential in order to make the contract or to create a right, while in a suit for the specific performance of a contract theretofore made and existing, a tender of performance relates only to the remedy.

We submit, therefore, that, upon both principle and authority, these complainants cannot maintain this action, because of their failure to tender a deed to defendant on the day fixed for performance—that by reason of such failure, no right has ever

accrued to complainants under the contract for re-purchase, nor has any obligation to perform, been cast upon the defendant.

III.

The letter written by Langdon, one of the complainants, to Brown, the defendant, of date Oct. 30, 1875, (six months before the time fixed for either election or performance), cannot in any way affect the rights of the parties; for that, it was not provided for in, or contemplated by the contract; it was not the act of all the executors; it was gratuitous, and not binding upon any one; it was not, by its terms, an election; it was not true.

It may be safely affirmed, we submit, in respect to all contracts, that after the contract is made, it is not in the rightful power of either party to change or alter the same, or to increase his own rights or cast additional burdens upon the other party, by his own acts or declarations to which the other does not consent. A careful examination of the letter will show how entirely foreign it is to every thing embraced in or contemplated by the contract. The letter is as follows:

ELMIRA, Oct. 30, 1875.

T. E. BROWN, ESQ., Des Moines, Iowa:

Dear Sir:—My wife's health is so poor that I am obliged to go away with her, and shall sail for Europe, Saturday next, for an absence of four, six or eight months. I have left all necessary papers for closing our matters, the redeeding of the Des Moines land, and all other necessary business, with Mr. Slee. The balance of $25,000, less what has been paid on Buena Vista county judgment, will be due April 25, 1876, and we shall desire the money at that time, as per contract. Yours truly,

C. J. LANGDON, Executor.

First. This letter unmistakably confirms, what we have endeavored to demonstrate in the *first* sub-division of our second main proposition of this argument, to-wit: That the day fixed for performance of the contract, was April 25th, 1876, and not on any day prior thereto. The letter proves that the complainants well understood that time and fact, by its statement that 'the balance * * will be due April 25, 1876, * * as per contract.' The time for the desire and the conveyance by

the complainants, and the payment of the money by the respondent, was, necessarily, one and the same time. It was not and could not possibly have been understood to be other than the particular time so fixed. The acts of re-deeding and payment were to be simultaneous—contemporaneous acts. The language of the letter shows that its writer so understood it; for he says he has left all the papers, including the re-deeding of the land, to be attended to by Mr. Slee, on April 25th, 1876, and shall desire the money *at that time*, as per contract.

It is not provided or contemplated by the contract that any *notice* of the *desire* by the executors for him to re-purchase shall be given Brown. No such notice is anywhere mentioned or referred to in the contract. By the terms of the contract, all that was necessary in order to require Brown to re-purchase, was for "the estate" or "said executors," to entertain the *desire* at the date fixed. They were not required to give Brown any notice of it whatever All they had to do, was to tender a deed for the land to Brown, on the day fixed, and Brown would have been thereby bound to accept it, and pay the money. His contract bound him at his peril, to be ready on that day to pay the money if the deed was tendered. The tender of a deed would be sufficient evidence of the "desire" on the part of the executors for Brown to purchase back the lands. The contract did not require any notice of the "desire" to be given to Brown, and he had no right to any notice of it. If, therefore, as is evident beyond doubt, the executors were under no obligation to give notice, and Brown had no right to any notice, it must follow that complainants could acquire no right for themselves or cast any additional obligation on the other party, by giving the notice contained in the letter or any other notice.

Second. The letter or so-called notice was not the act of "the estate" or of "said executors." If it be conceded that the writer of it was then acting in his capacity as executor, (which may well be controverted,) still this concession would not give any legal force and effect to the letter or notice. It will be seen by reference to the original contract that Brown was to re-purchase the land if "the estate" so desire;

accrued to complainants under the contract for re-purchase, nor has any obligation to perform, been cast upon the defendant.

III.

The letter written by Langdon, one of the complainants, to Brown, the defendant, of date Oct. 30, 1875, (six months before the time fixed for either election or performance), cannot in any way affect the rights of the parties; for that, it was not provided for in, or contemplated by the contract; it was not the act of all the executors; it was gratuitous, and not binding upon any one; it was not, by its terms, an election; it was not true.

It may be safely affirmed, we submit, in respect to all contracts, that after the contract is made, it is not in the rightful power of either party to change or alter the same, or to increase his own rights or cast additional burdens upon the other party, by his own acts or declarations to which the other does not consent. A careful examination of the letter will show how entirely foreign it is to every thing embraced in or contemplated by the contract. The letter is as follows:

ELMIRA, Oct. 30, 1875.

T. E. BROWN, ESQ., Des Moines, Iowa:

Dear Sir:—My wife's health is so poor that I am obliged to go away with her, and shall sail for Europe, Saturday next, for an absence of four, six or eight months. I have left all necessary papers for closing our matters, the redeeding of the Des Moines land, and all other necessary business, with Mr. Slee. The balance of $25,000, less what has been paid on Buena Vista county judgment, will be due April 25, 1876, and we shall desire the money at that time, as per contract. Yours truly,

C. J. LANGDON, Executor.

First. This letter unmistakably confirms, what we have endeavored to demonstrate in the *first* sub-division of our second main proposition of this argument, to-wit: That the day fixed for performance of the contract, was April 25th, 1876, and not on any day prior thereto. The letter proves that the complainants well understood that time and fact, by its statement that 'the balance * * will be due April 25, 1876, * * as per contract.' The time for the desire and the conveyance by

the complainants, and the payment of the money by the respondent, was, necessarily, one and the same time. It was not and could not possibly have been understood to be other than the particular time so fixed. The acts of re-deeding and payment were to be simultaneous—contemporaneous acts. The language of the letter shows that its writer so understood it; for he says he has left all the papers, including the re-deeding of the land, to be attended to by Mr. Slee, on April 25th, 1876, and shall desire the money *at that time*, as per contract.

It is not provided or contemplated by the contract that any *notice* of the *desire* by the executors for him to re-purchase shall be given Brown. No such notice is anywhere mentioned or referred to in the contract. By the terms of the contract, all that was necessary in order to require Brown to re-purchase, was for "the estate" or "said executors," to entertain the *desire* at the date fixed. They were not required to give Brown any notice of it whatever All they had to do, was to tender a deed for the land to Brown, on the day fixed, and Brown would have been thereby bound to accept it, and pay the money. His contract bound him at his peril, to be ready on that day to pay the money if the deed was tendered. The tender of a deed would be sufficient evidence of the "desire" on the part of the executors for Brown to purchase back the lands. The contract did not require any notice of the "desire" to be given to Brown, and he had no right to any notice of it. If, therefore, as is evident beyond doubt, the executors were under no obligation to give notice, and Brown had no right to any notice, it must follow that complainants could acquire no right for themselves or cast any additional obligation on the other party, by giving the notice contained in the letter or any other notice.

Second. The letter or so-called notice was not the act of "the estate" or of "said executors." If it be conceded that the writer of it was then acting in his capacity as executor, (which may well be controverted,) still this concession would not give any legal force and effect to the letter or notice. It will be seen by reference to the original contract that Brown was to re-purchase the land if "the estate" so desire;

and by the supplemental contract he agreed to re-purchase "if said executors desire it." By reference to the letter under consideration, it will be seen that it does not claim or purport to be the act or notice of any one, other than the writer, C. J. Langdon. He says it is true, "*I* have left all necessary papers * * with Mr. Slee * * and *we* shall desire the money at that time as per contract." If this shall be construed the most favorable possible for complainants in the way of an expression of desire, it could be held only as an expression by Langdon of the desire of himself and Mr. Slee. But the letter does not express or profess to be written with either the consent or knowledge of any other executor than the writer; and it certainly does not claim or purport to have been written by their authority. It is not, therefore, in any view of it, an expression of a desire by "the estate" or by the "said executors."

The complainants are joint executors or trustees, and it was necessary in order to bind themselves or Brown by any notice of their desire, that they *should all concur* in making the election or in expressing their desire. It is, as we understand it, well settled by the authorities that in such cases the concurrence of all the executors is necessary. In *Hertel et al. vs. Bogert et al.*, 9th Paige's Ch. 52, Chancellor Walworth says: (p. 57.)

> If a promissory note is given to the testator, or a bond and mortgage are given to him, in his lifetime, the indorsement of the note by one executor, or the assignment of the bond and mortgage by him, would be sufficient to transfer the legal title to such security to a purchaser thereof. And if the purchase in such a case was made in good faith, a court of equity would not interfere The appellant's counsel, however, is under a mistake in supposing that a security given to two or more ex ..tors jointly stands upon the same footing, so as to authorize one of the executors to transfer the legal title to the security without the concurrence of his co-executors. For in such a case the legal title to the security is in all the executors jointly, in the same manner as if it had been given to them as trustees under an ordinary trust; and the concurrence of all the executors is necessary to transfer the legal title of the security to the purchaser thereof.

To the same effect is *Smith vs. Whiting*, 9 Mass., 334, and many other cases.

It is evident, therefore, that the notice of the election or desire contained in the letter, was not such notice by all the executors

as would bind them all, and of course was not such notice as would bind Brown. For, unless it was such notice as would be mutually binding upon both parties, it could not bind either. Suppose Brown to have tendered his money on the day fixed, and to have brought his action to compel the executors to convey, on the ground that they had made their election and given notice thereof by the above letter. Is it not clear, beyond any and all question, that the executors could successfully resist such action on the ground that all had not joined in the election and notice? Or, suppose that after giving the notice the executors had sold the land, or a part of it, and required Brown to surrender possession according to the terms of his lease, is it not very manifest that he could not successfully resist such purchaser? How could Brown hold the executors not joining in the election or notice, bound thereby? Clearly he could not. Hence *they* cannot hold *him*.

If it should be conceded, then (what it seems to us can hardly be claimed by any one), that the letter, not being withdrawn, was a continuing notice up to and including April 25, 1876, such concession would not help the complainant's case, for since the notice was not made or given by or for all the executors, it was clearly insufficient in its substance and of itself.

Third.—We have before seen that the contract did not *require* any desire or notice of it *before* the day fixed for the performance, to-wit, April 25, 1876. It is, we submit, not necessary to further discuss that point. It is well established by the authorities, and will, doubtless, be conceded. The executors were not bound to give any previous notice of their desire. The giving of the notice was, therefore, not only voluntary, but was also wholly gratuitous. It was without any consideration whatever—a *nudum pactum*. It could not, for this reason, be enforced against the executors. Since it did not bind them, it could not bind Brown. As fully supporting this proposition, we quote from Leading Cases in Equity (*Seton vs. Slade*), vol. 2, pt. 2, page 1132 (4th ed., 1877), as follows:

> It has never been held, or even contended, that when A. writes to say that he will convey if B. will agree to the terms proposed before the month is out, a court of equity can relieve against B.'s failure to reply at the appointed time;

and the principle is the same where A. stipulates for payment as distinguished from an agreement to be answerable for the price. It is *immaterial* that B. *declares his assent*, and that he *will send the money when the day arrives*, because the the acceptance varies from the offer. Notwithstanding any *such declaration*, the vendor *may retract* before the money is tendered, and as *he is not bound, the purchaser is also free.*

See also *Story on Sales*, Sec 250, and cases cited in notes.

Fourth. The language of the letter itself does not amount to a notice that the writer *had before* that time or *did at the date* of the letter elect or desire Brown to purchase back the land. He does not say that we *now elect* and declare to you that *we desire* you to re-purchase the land. It is no notice of a present election, nor a statement of a *then existing* desire to re-sell the land. But the letter says that the contract will expire April 25, 1876, and we *shall* desire the money at that time as *per contract.*

The writer of the letter evidently thought he was giving notice of what *they would do* at the time they were allowed to make their election; and he says, in a spirit of prophecy, if the court please, that we *shall desire* the money at that time *as per contract.* In other words, he says to Mr. Brown, as his friend and distant relative by marriage, we want you to understand that we are going to be around on the day fixed for our election, and when that day comes, "we shall desire" to accept your offer, and convey to you the land. The statement that they would desire the money as per contract, was a distinct notice to Mr. Brown that they would tender the deed, as the contract under the law required, on the 25th day of April, 1876. This, they did not not do either in accord with the notice or persuant to the requirements of the law.

Fifth. The record in this case shows that the statements of the letter and alleged notice were not true; and it does not well accord with the purity required by courts of equity to suppose that any right could be acquired by a false statement or a false pretence. The letter states that the writer had left all necessary papers, including the re-deeding of the land, with Mr. Slee. If this statement had been true, it would have tended to show that the complainants had made their election and did really

then entertain the desire for Brown to re-purchase, as in the case of *Goldsmith vs. Guild*, 92 Mass. (12 Allen,) 239, supra. But that it was not true and that the statement was not made in verity and *bona fide*, is evident from the fact that the re-deeding bears date April 25, 1876, six months after the letter was written, and was not acknowledged by any of the parties till June 20, 1876, the probable day of its actual preparation. The theory of the case entertained by Langdon when he wrote the letter, as well as the purpose he had in writing it, are alike unknown to us; and it may not be proper for us to indulge in an expression of our suspicions in respect thereto.

For the reasons we have thus stated, at too much length perhaps, we confidently submit that the letter and alleged notice of date Oct. 30, 1875, can not in any way effect the rights of the parties to this action.

IV.

The letter written by Brown, of date May 26, 1876, to Langdon, one of the complainants, does not at all affect the rights or liabilities of the parties, for that it was not a waiver; it was without consideration; it very unmistakably refused to perform the contract; it made a new proposition, which was declined.

DES MOINES, 26 May, '76.

CHARLES J. LANGDON, *Esq., Elmira, N. Y.:*

Dear Sir: Your letter to me last fall in regard to the land here did not seem to require an early answer, and I have delayed it until now. I shall not be able to pay you the money this year, and propose the following, which I trust will answer your purpose: 25th April, '77, $5,000, and a like sum on the 25th of each April following, all unpaid sums to draw six per cent per annum from April 25, '76. The land to remain in your name as it is until all is paid. The last payment would be fractional part of $5,000, of course. This is small interest, but interest must in the future be less than it has been, and this is all I get on money that has been due longer than this has to you. There has been nothing paid on the Buena Vista judgment since my remittance to you. The county are trying to have the same set aside for some informality or fraud, and may succeed, but I think not.

Very truly yours, etc.,

T. E. BROWN.

First. There is certainly nothing in the language of the let-

ter in the nature of *a waiver*, and the defendant, in his answer, avers that[6]

He intended to make the said executors a new and original proposition to purchase back said land on such time as would admit of an amicable adjustment between him and the said executors of a claim held by him against them, and which claim was not then, as this respondent thought, in a condition for use in making such payment. Said letter expressed both an inability and an unwillingness to re-purchase said land upon the terms specified in the contract of April 25, 1871. He denies that he asked for an extension of time on the former contract.

The claim thus referred to as not in a condition for adjustment, is that embraced in the cross-bill of the defendant herein. (It was not then in a condition to use for payment because by the terms of the purchase by Brown of Langdon's interest in the firm of T. E. Brown & Co., Brown was to protect the estate against the claims of one Baldwin who insisted he was also partner, in said firm, and his claims were not then adjusted or released. These facts sufficiently appear in the cross-bill.) The letter does not say that the writer waives the time, nor is such a construction of it either natural or reasonable. But perhaps we cannot better put to final rest this claim of waiver than by quoting a paragraph from an opinion of this court, in the *Bank of Columbia vs. Hagner*, 1 Peters, 455, *i. e.* 467. That was a case where the party complainant had not made the tender within the time, and relied upon a letter as constituting a waiver. The court upon that point uses the following language:

They have attempted, however, to show that a tender of a deed was rendered unnecessary by reason of the letter of the defendant of the 8th of May, 1821, in which he gave notice of rescinding the contract. But this letter can have no such effect. It was written sixteen months after the time fixed for the delivery of the deed, and when the defendant had a right to rescind the contract. If, before the period had arrived when the deed was to be delivered, the defendant had declared he would not receive it, and that he intended to abandon the contract, it might have dispensed with the necessity of a tender, as the conduct of the defendant might in such case have prevented the act from being done; and he who prevents a thing from being done shall never be permitted to avail himself of the non-performance which he himself had occasioned. But that rule can never apply, except in cases where *the act* which is construed into a waiver *occurs previous to the time fixed* for the performance.

(6) Printed record, p. 11, folio 34.

We call the especial attention of the court to the last paragraph of the quotation, that an act or a declaration cannot be construed into a waiver of the time fixed for performance as a condition precedent, unless such act or declaration occurs previous to the time fixed for performance; here the time fixed for performance was passed a month and a day before the letter was written.

The correct rule of law in such cases is very concisely stated in *Ripley vs. Etna Ins. Co.*, 30 N. Y., 136 *i. e.* 164, as follows:

> It seems to me that a waiver, to be operative, must be supported by an agreement founded upon a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition.

To the same effect is *Underwood vs. Farmer's Ins. Co.*, 59 N. Y., 500 *i. e.* 506.

But again, this is not a case where a contract for sale and purchase had been made. No contract for the sale and purchase of the property in controversy had ever been made or concluded by the complainants; but simply an offer by the defendant, which the complainants might accept within a given time. If it was not accepted within that time, the offer itself was at an end, and a subsequent negotiation respecting the same property could not in any event make that a contract which never had any existence as such. The case is different from that where a contract exists, and one party declares a forfeiture, or has a right so to declare; then a subsequent negotiation respecting it, without insisting upon his right to declare a forfeiture, might in certain cases be construed into a waiver. But here no contract of sale and purchase ever existed. There was no forfeiture to be declared. It was simply a right given to the complainants to accept an offer within a given time. If not accepted, the offer itself was terminated and it required no act of forfeiture, or anything else, in order to end the right of the complainants. It could not be a valid and binding waiver in any event, since there was no consideration whatever for it. The letter was not, therefore, a waiver. It cannot, either, in any event be an estoppel, for no act has been done by the opposite party, because or on the faith of it.

Second. Frankness of expression or even bluntness of language may sometimes conduce to a more perfect understanding of what is intended; but we feel quite sure that the use of gentle and courteous language which fairly expresses the meaning intended, cannot be made, in equity, a basis for a liability which it was never intended to assume. Mr. Brown might have said in his letter 'I will not pay you the money which you seem to demand, either this year or ever.' But instead of expressing himself in that blunt way, he utters in the second line of his letter, what the law as well as ordinary business sagacity or experience, would readily and necessarily interpret as meaning the same thing: to-wit: "*I shall not be able* to pay you the money this year, and propose the following, *which, I trust, will answer* your purpose." What is the practical effect or necessary import of this language? It is and can be nothing more or less than a gentle and courteous refusal to perform the alleged contract. He says 'I shall not be able' to perform it. If he is *not able*, of course he *will not* perform it. The expression of an inability, is but a mild form for the expression of a refusal. If a note is presented to the maker for payment, in order to charge the endorser, and the maker says 'I shall not be able to pay you the money' to-day; the maker, the notary, the endorser and the court alike understand the language used to amount to *a refusal* to pay, and that by such refusal the notary is entitled to his fees for protest, the endorser is liable upon due notice and the court is bound to find that the maker did *refuse* to pay, and to render judgment accordingly. Mr. Langdon, most unmistakably, so understood it, for he promptly answered on May 31, 1876, "and declined the proposition therein contained."[7] He does not insist again that Brown shall perform his contract or distinctly refuse; but he recognizes the refusal as absolute; declines Mr. Brown's new proposition and says not a word about his duty to perform or to make any effort to do so, and then brings this suit.

The whole tenor of Mr. Brown's letter shows a courtesy towards Mr. Langdon, (who is a relative of Mrs. Brown,) which compels the construction we have been suggesting, even if such

(7) Printed record, pg. 35 folio 96.

was not, as we submit it most manifestly is, the fair, natural and ordinary construction of the language used. The case of *Magoffin vs. Holt*, 1 Duval (Ky.) 95, *supra*, shows that considerable correspondence was had between the parties, before any direct refusal to re-purchase was made. Brown's letter is a very manifest refusal instead of a waiver.

Third. The letter of Brown contained not only his modest but substantial refusal to recognize the validity of the claimed contract or to perform it, but it also contained a new and distinct substantive proposition. The refusal was correctly apprehended by Langdon, as was also the new proposition, which he very directly and promptly declined. (See agreed facts in printed record, page 35, paragraph 12).

We submit that the letter of date May 26, 1876, by Brown to Langdon does not affect in any way the rights of the parties herein.

We confidently submit that the judgment of the Circuit Court should be reversed, and the complainant's bill ordered to be dismissed absolutely.

CROSS-BILL.

We now leave this first and turn to the second branch of the case. By his cross bill and amendment thereto, (folios 55-61 and 113-119) Brown claims of Langdon's executors over $43,000 with interest from August 1, 1876, based upon said Langdon's individual and written guaranty of a debt held by him against John S. Baldwin, and sold and thus guaranteed by said Langdon to the firm of Brown & Company, while he, (Langdon) was a member of said firm. All the essential facts connected therewith appear fully and are set out at length in the pleadings, (cross bill and amendment,) and since these are in the argument to follow, stated with all necessary detail, we shall not here recapitulate them. Complainants challenge our right to recover, by demurrer, thereby admitting the truth as far as well pleaded, of every material fact stated in these pleadings. The question then is whether upon the face of these pleadings we are entitled to the relief prayed. In other words, the pivotal inquiry is whether by the terms of the contract of April 25, 1871, (folios 81, 82 and 83,) and in view of the averments of the cross bill as amended, respondent is concluded from recovering upon Langdon's guaranty of the Baldwin indebtedness. We speak of the contract and construction it should receive in the light of the pleadings. For while we concede that the correctness of the action of the court below in sustaining this demurrer must be largely determined by the contract of sale, it is nevertheless true that the averments in the cross bill of the facts surrounding the transaction must have attention and consideration in giving to the contract its true interpretation. In a word, it must be construed in the focal light of all the facts surrounding the parties to the contract.

First. We first refer to some general propositions in respect to the construction of this contract, which we know are

familiar, and yet as we deem them of value, beg very briefly to state them.

1. In the construction of this, as of all contracts, the intention of the parties will always be carried into effect so far as the rules of language and the law will permit. In arriving at this it is always of the greatest service to look at the situation of the parties as also the property which is the subject matter of the contract, and their purpose and intention in making it.

2 *Parsons on Contracts*, 499 *et seq.*

And while a new contract will not be made, yet the one party will be held to that meaning or construction which he knew the other party supposed the words to bear. (*Ib.*) And courts will vary the construction of the instrument in order to meet the intention of the parties.

Barclay vs. Lucas, 1 D. & E., p. 157.
Wright vs. Russell, 2 Wilson 530.

2. If the language of this contract is clear and unambiguous, then constrction has nothing to do. The very idea and purpose of construction implies uncertainty as to the meaning of the contract. (*Ib.*)

3. Every contract should receive a rational and just construction. The intention, which is always to be sought for, is ever best ascertained by affixing to the words employed, such meaning as is common or ordinary. If, however, any words have in law a defined meaning, they must be understood in that sense. The intent ought to be picked out of every word and not of one word alone. (*Ib.*, 501 and note.)

4. Where there are recitals of particular claims or considerations followed by general words of release, the general words will be restrained by the particular words.

Paylor vs. Homersham, 4th M. and S., 426.
Lyman vs. Clark, 9th Mass., 235.
Simons vs. Johnson, 3d B. & Ald., 175.
Rich vs. Lord, 18 Pick, 325.

And recitals in an agreement have, under some circumstan-

ces, great influence in the interpretation of the other parts of it—even its covenants or obligatory part.

Moore vs. McGrath, Cowp. 9.
Cholmondeley vs. Clinton, 2 B. & Ald., 625.

And though a release, for instance, be general in its terms, it may be limited and controlled in its effect by limitations in the recital.

Pierce vs. Parker, 4 Met. 80.

Arg. Defendant made his note to plaintiff in June, 1813, for $152. In November of the same year he made to him another note secured by mortgage for $480, and the payee executed a paper reciting that this note "*when paid is in full of all demands*," *held* that this did not release the liability of defendant on the first note.

Lyon vs. Hart, 2 Con., 120.
Knight vs. Cole, 3 Mod., 277.
Thorpe vs. Same, 1 Ld. Raym., 235; 5, Bac. Ab. 710.

"All demands" were mentioned in the recital as well as in the operative part of the instrument, yet the court restrained its operation and held it to exclude particular demands.

Butcher vs. Butcher, 4 Bos. & Pul., 113.

Where a release is made for a particular purpose or purposes, the general words are to be guided by the particular purpose.

Morris vs. Philpot, 2 Mod., 108.

If a deed speaks by general words, and afterwards descends to special words, if the special words agree to the general words, the instrument shall be intended according to the special words.

Lit. R., 345, Hob. 172.

5. The condition of a bond may always be considered in determining or to explain the obligatory part.

Coles vs. Hiem, 8 B. & C., 568.

6. It is a general rule, especially where the same instrument is to be executed by various persons standing in various relations, and having various kinds of claims against the releasee, that general words, though the most broad and comprehensive, are to be limited to particular demands. This is always so when it appears from the consideration, from the recital, from the nature and circumstances of the several demands to one or more of which it is proposed to apply the agreement or release, that it was so intended to be limited by the parties.

Rich vs. Lord, 18 Pick., 325.
Jackson vs. Stackhouse, 1 Cow. 126.
Paylor vs. Homersham, 4 M. & S. 423.

7. By *guaranty* we understand the contract by which one person is bound to another for the due fulfillment of a promise or agreement of a third party, a promise to pay the debt of another.

2 Parson's Con. 3.

And this was Langdon's contract with Brown as to the Baldwin debt.

8. *Indemnify*. To make or save harmless; to save against loss or damage. And this is what Brown undertook in this contract.

9. *Release*. The giving or discharging the right of action which a man hath or may have or claim against another, or that which is his.

Shep. Touch. 320.

10. The principle is elementary, (found in Pothier, and stated by Story on Partnership, Sec. 184), that each partner is bound to account to the others for all that he owes to the firm, deducting what is due to him from the firm.

11. The rule of the common law is that there is no right of contribution between joint wrong doers, as when one has paid the whole damages or expenses occasioned thereby, and this rule is as applicable to partners as to others.

Story on Part., sec. 220.
Pearson vs. Skelton, 1 M. & W. 506.

Second. We now come to the more specific application of our propositions, to the contract and record. By our cross-bill as amended it will be seen that we make these averments:

1. That Baldwin was indebted to Langdon in the sum of $87,552.44 upon account, which he Langdon, sold to Brown & Co. and guaranteed and promised to pay. (Fol. 49.)

2. That a portion only of the debt was paid by Baldwin, and there remained due and unpaid with interest on the first day of of August, 1876, the sum of $43,800.58, (51,) or about $32,000 at the date of the contract.

3. That upon the faith of this promise and guaranty, Langdon was permitted to draw out of the firm a large sum of money, to-wit: $59,000, which was only tolerated because of the balance in his favor by crediting him with the Baldwin account, (53.)

4. That this claim was Langdon's individual guaranty of Baldwin's debt to the firm, made in writing, and has been repeatedly so scheduled both to Langdon and his executors, (115.)

That the credit to Langdon was given with the distinct and unqualified promise that Langdon would see that Baldwin would deliver the lumber named. In a word, that Baldwin would pay the amount so transferred, (116.)

6. That the claim so guaranteed was one of the assets for which Brown paid the executors $100,000. There was no intention at the time of said purchase that the executors were to be released from the said guaranty, and Brown, since all the other assets of the firm were in serious litigation, was largely induced to make said purchase on account of the Baldwin claim which he regarded good with the guaranty and doubtful without it, (*Ib.*)

7. Langdon's interest in the firm without the claim of Baldwin so guaranteed, was a grossly inadequate consideration for the $100,000 paid. (117).

8. That a construction of the contract which would release Langdon from his guaranty would be grossly inequitable, unjust and oppressive, and contrary to his (Brown's) understanding of both its letter and spirit. (Ib.).

9. That this guaranty was Langdon's individual transac-

tion upon his own account and responsibility, and had no connection whatever with the business or transactions of the firm, or *with the capital which he was to furnish.* (Ib.). Nor was it any part of the capital furnished or to be furnished by him, nor ever so treated.

10. That this transaction was always treated by Langdon as his individual guaranty, made upon his own personal account, and not as a part of the firm business.

11. That though this claim was the subject of conversation at the time of the purchase evidenced by the contract of April 25th, 1871, the same was not settled nor intended to be embraced in the terms of settlement. (119).

12. It is distinctly averred as a substantive and existing fact that this claim against the executors by reason of Langdon's guaranty, was not embraced in said settlement nor intended to be, but was omitted for adjustment between the parties in case Baldwin should fail to pay. (Ib.).

13. It also appears by said cross bill and amendment, that at the time of the filing of the original bill as also the cross bill, said Baldwin was insolvent and still continued so to be, though at the time of the purchase, there was a hope that the debt might be collected from him. Also that Brown had since settled with Baldwin and there was found due on the account so guaranteed the amount claimed, and that Baldwin executed a release, etc. (114).

14. That such claim still justly subsists in his (Brown's) favor against said estate of Langdon, and has been both by him in his life time, and his executors, since his death, acknowledged to so subsist. (59).

Third. The cardinal inquiry then is whether in view of these averments, the contract itself contains anything to prevent the enforcement of the guaranty as claimed by Brown, that is, recovering of the estate the amount due from Baldwin.

In coming to this inquiry we shall endeavor to show:

First. That there is nothing in the language employed which, by any fair or legal intendment, includes or embraces this guaranty.

Second. In view of the language and contents of the cross bill, all the facts and circumstances as thus brought to the at-

tention of the court, every claim and specification of such contract is referable and only referable to other and different transactions or liabilities.

If in either view we are right, of course the argument would be accepted as conclusive. If right in both—and we hope to so show—then we hardly need say that we doubly demonstrate that the demurrer was improperly sustained. Should we repeat ourselves, or more than once quote from the contract and cross-bill, we will be excused in view of the importance of constantly keeping before the court the very language upon which we, at the time, comment. Your honors will the more readily indulge us in this also, since our purpose is to so embody the essential facts of record as that the pertinency and conclusiveness of our argument may be seen without troubling you to refer to the record itself. We then maintain:

First. That there is nothing in the contract itself which by fair legal construction includes this contract of guaranty. The contract will be found commencing at folio 81 and again at 97. By this it appears:

1. That Brown, by his purchase, in consideration of $100,000, got "all the right, title and interest of Langdon in and to the undivided property or assets of the late firm of T. E. Brown & Co." If this claim against Baldwin, guaranteed by Langdon, was a part of the property or assets of said firm, then it was sold, assigned and set over to him. If it was not, then it was not included nor covered by the contract. That it was the property and part of the assets of the firm, will probably not be denied.

2. He, however, took this and all other assets *subject* to certain things or to a liability on his part to meet certain debts. What were these?

3. We answer:

First. All taxes or assessments made or to be made on the property purchased.

Second. To all indebtedness therefor.

Third. To all liabilities of the firm or its members for *transactions in the business of the firm in tort or contract.*

Fourth. All judgments recovered or to be recovered against the firm or its members.

Fifth. All costs, officers, counsel fees and disbursements.

Sixth. Liability for contribution in consideration of moneys paid or to be paid on any liability.

4. These and these alone thus far are the liabilities to which the property or assets purchased were subject. And here we maintain that the debt against Baldwin, guaranteed by Langdon, was neither a "*tax*," an "indebtedness," a "judgment, costs or disbursement," a "liability to contribution," nor a "liability for the transactions of the firm, either in tort or contract." For one object of the language "liability for the transactions of the firm or any of the members thereof, etc.," was to cover liabilities in *tort* as well as *contract*. Without this, Brown would not have been bound for any sum paid or for which Langdon might have been liable in *tort*, but with it Brown would have to meet and discharge it. Then, too, the words "for transactions in the business of the firm," relate to *firm* business and not an independent indebtedness growing out of the guaranty. In other words, if Baldwin had made his note to Langdon and he had indorsed it to the firm for a valuable and full consideration, this would not be a transaction in the business of the firm within the meaning of the contract.

5. This was not a liability of the firm, and what this contract means in this language is a firm liability and that of *any member by reason of the firm liability*.

6. In all the language used as to all these liabilities to which these assets were to be subject, reference is most clearly had to *firm* liabilities and the following liability of each member. The object being to make Brown take Langdon's place as a member of the firm touching Langdon's liability as such member for firm debts.

7. The matters found and thus stated in the second clause of the contract are in the nature of recitals of the matters with which the property was to be encumbered in the hands of Brown, and unless clearly controlled or enlarged by what follows must be taken as expressing *all* the burdens. Thus far Brown has not undertaken nor promised anything—has covenanted nothing. This liability of Langdon's was not a burden upon the assets, but his own debt. It was an *asset* in fact and

not a *liability*—certainly not of the firm, and hence not his as a member thereof.

8. Turn then to the third clause and we come to what Brown undertakes to do. And here we suggest,

First. That this does not enlarge upon what precedes since it says "of, from and against *all of which* real or possible liabilities," thereby clearly showing that he undertook to "*indemnify and save harmless*" the executors, etc., against the *very matters* and none others to which the property purchased was "subject."

Second. The succeeding language, ("and of, from and against any other liability growing out of the transaction of said firm,") though more general than that which immediately precedes, must be taken in connection with all that is found in the contract, and can not and will not be otherwise read or construed.

Third. And yet it is not broader nor more comprehensive than the words "to all the liabilities of said firm or any of the members thereof for transactions in the business of the firm, etc.," found in the second clause and upon which we have commented above.

Fourth. Brown undertook to *indemnify* these executors as against *firm* liabilities—"any other liability growing out of the transactions of said firm," not against any debt owing *by* Langdon, not as a member of the firm, and arising and growing out of a separate and independent contract.

Fifth. We have seen that to *indemnify* is to "save against loss or damage." This is never the language used where one party proposes to acquit or release another from an existing liability. If two persons are alike liable for a debt the one may contract to indemnify or save harmless the other as to such liability and assume the debt and hold the other harmless. And it was just this that Brown was doing. But if one is owing the other, he may be *released*, not *indemnified*. The word "indemnify" is never used except to protect the obligee against the acts or claims of third persons.

6. There is no question that one partner may become the debtor of the firm. He may make a valid contract with it.

Langdon made such a contract and this as part of the assets passed to Brown & Co. by the contract and assignment shown by Exhibit "E" (folio 85) This then was his individual liability—his debt or indebtedness to the firm, and not his *liability* as a member *of* it. By this transfer there was thus vested in Brown a complete right of action—and not a right of action in a third person. In this condition of things it would seem that instead of *securing* a release they would have *made* one; that instead of indemnifying they would have executed a release in proper form. In such a case there is neither reason nor logic in relying on promises or securities, for the parties are in a position to end the matter by executing a discharge or release.

7. The members of this firm could not by this contract nor any other, release themselves from any liability of the firm or the members thereof to others or their creditors, and hence, notwithstanding this contract, these executors might still be sued by the creditors of the firm. The partners could have agreed among themselves that one should pay the debts or hold the others harmless as to such debts. This contract does not undertake to release either the firm or Langdon's executors from these debts. But against such debts, whatever their nature or calls for contribution, Brown agrees to indemnify these executors. This and no more is the extent of his contract. The guaranty, however, never was a debt *against the firm*, but the debt of Langdon, not as a partner but as an individual contracting with the firm. Brown might have released this debt in this purchase, but to say that because he indemnified against all liabilities he thereby released the debt, is most absurd. The parties selected law language appropriate to the very matter before them and the language is to be thus construed. If this debt against Baldwin had been a note of $43,800.78, endorsed or guaranteed by Langdon, no one would perhaps be bold enough to insist that anything in this contract would be held to release or discharge such liability, and the rule must be the same in this instance.

8. This contract is apparently very explicit in naming the several considerations of the purchase—in specifying Brown's liability and referring to the various matters entering into the trade.

And hence your honors will see that certain notes held by the estate against Brown, ($17,000) evidently an individual transaction, were to be surrendered, (folio 84.) And all claims of Langdon's for loans or advances to the firm were in terms released, (folio 85.) And now we ask is it a reasonable or a just construction of this contract that under this *indemnity* clause a debt of over $43,000 was released and discharged when the drattsman as to other individual debts has used apt and appropriate words?

9. This was a large claim. As the pleadings show, it had been the subject of much discussion. It would seem, if it was intended to settle or include this large liability, that it would have been almost the first thing to mention, the first and clearest set out in the contract A good and skillful lawyer (and such a one evidently drew this contract) indulging in such detail of expression and well understanding the use of the terms employed, it is but too obvious, if it was intended to release this large debt, would have so provided and not have left to implication; or, what is worse, would not have used language clearly indicating that he was protecting or indemnifying against firm liabilites and not releasing from individual obligations. So far as this was to be a release or surrender, he provides for it; and the very silence of the contract as to the release or discharge of this debt is demonstrative evidence that it was intended to leave it for future adjustment as we aver in the cross bill.

10. If the language of the contract is not clear and unambiguous, if it is uncertain in meaning, then, we submit, that the intention of these parties, the property which was the subject of the contract, and their purpose and intention in making it, are of incalculable service in arriving at its meaning. All this your honors get from the cross bill. You are there advised how inadequate the consideration received by Brown for the $100,000 paid, if this debt is to be excluded the assets. We further find that Langdon received from the firm a large amount of money upon the faith of this guaranty, which it is now claimed is to be entirely lost to the firm and to Brown, since Baldwin is insolvent and Langdon is released. In addition to this it is averred (folio 119) that this claim was "*not embraced*

in the settlement nor intended so to be, but was omitted for after adjustment." Guided by these circumstances and averments, can there be any doubt as to what this contract means?

11. The letter of the contract is in perfect harmony with our view, and to say that its spirit and purpose are otherwise, would work the grossest wrong and injustice.

As to the matter found in the fourth clause of the contract (folio 82), it will not probably be claimed by the other side that it covers, or by implication, even, includes a release from this liability. Indeed, it will be found, we submit, that the very language there used in view of its specific reference to what Brown is to pay and against what he agrees to "indemnify and save harmless" the executors, the frequent and repeated use of these terms, we say we submit that the clause in all its parts is in aid of our construction of the entire instrument, as we shall insist more at length at bar.

II.

Leaving now this point, we turn to our second proposition.

That every clause of this contract is referrable to other and different transactions or liabilities—in other words, finds something else upon which to feed, than Langdon's guaranty of the Baldwin debt.

And here there are two important facts demanding attention.

The first is that the liability for which the executors of Langdon are sought to be held by the cross bill, is not a liability direct, certain or fixed.

It is not a liability by Langdon to the firm of T. E. Brown & Co. direct, nor was it certain that any liability would result from his undertaking, nor was the amount of that liability ever fixed or determined. It certainly was not at the time of the sale. It was in no just sense a transaction with the firm in matters connected with the firm business; but it was rather in the nature of a personal transaction by Langdon with Baldwin, his debtor, whereby that debtor became bound and assumed a new liability to the firm. It was such a transaction, in fact, as that where a negotiable security, made by third persons in its transfers from the original payee to endorsees, one member of the firm had become indi-

vidually liable thereon as guarantor, and which security, with the guaranty as an incident thereto, should afterwards come to the firm. In such case, we submit, the guaranty by the member of the firm, is in no sense a dealing with or liability by him to the firm, so that, in the settlement of his accounts as partner, his liability on such guaranty would necessarily or could properly be considered.

The particular liability then, upon which the cross-bill is bottomed, is the guaranty by Langdon of the payment of an indebtedness assumed or novated by Baldwin to the firm, which indebtedness was being from time to time reduced, and which liability of Langdon as guarantor could only arise upon both the failure of Baldwin to pay the same and his ultimate insolvency; for, the guaranty as alleged, is substantially a guaranty of collection in lumber and not a guaranty of payment at any fixed time.

The other fact is, that by the terms of the contract, the executors did not propose to sell the interests of Langdon in *the partnership*, but, rather, a specific sale of his interest "in or to the undivided property or assets," and also a personal claim held by them against Brown, amounting to the sum of $17,000. The word *interest* is used because of the fact, in view of the claim by Baldwin that he was a member of the firm, it was not certain whether Langdon's interest was a *third* or a half. But in view of the ultimate fact that Baldwin was found not to be a member, the contract is the same as if it had read an "undivided half interest" in or to the property or assets of the firm. The sale by the executors to Brown was not as a sale by a retiring or outgoing partner to his remaining partner, whereby such selling or retiring partner takes a certain sum and leaves the firm with all its bills receivable and bills payable, including those due both to and from the selling and retiring partner. And, without now stopping to discuss the question, (which we certainly could not admit,) as to whether such a retiring partner would be absolved from his remote, contingent and uncertain liability, as upon his guaranty of collection upon a security then held by the firm, we call the attention of the Court to the fact that this sale by the executors to Brown, was not such a sale.

The first clause of the contract, and that which evidences the grant and specifies what was sold and transferred to Brown, is as follows:

> The executors of Jarvis Langdon, deceased, for value received, hereby sell, assign, set over and transfer unto Talmadge E. Brown all the right, title and interest of J. Langdon, deceased, in or to the undivided property or assets of the late firm of T. E. Brown & Co., of Memphis, Tennessee.

The contract, it will be observed, does not sell the interest of Langdon in the *firm* or *partnership*, but it sells and conveys his interest in the *undivided property* or assets of the firm; and if there were no further conditions in the contract than those contained in this first clause, the executors would have remained liable for the payment of their proportion of the partnership debts; for, by this first clause, they sell and transfer all their interest in the undivided property or assets of the firm, and not what interest might remain to him therein after the debts of the firm were paid. But the undivided property or assets at the time the contract was made, passed by this clause to Brown, and therefrom would arise no obligation upon the part of Brown, as between the executors and Brown, to pay any debt or liability other than his half. What Brown is to pay of the debts of the firm, and the liabilities against which he is to indemnify Langdon, are specified in the subsequent parts of the contract.

We are now considering simply what was sold to Brown and what he would take if there were no conditions whatever annexed. The closing paragraph of the contract shows that the executors were also to surrender to Brown his notes, which they then held, amounting to $17,000. By this first clause then, Brown acquired the undivided half interest of the executors, in the debt which Baldwin owed the firm; that was one of the assets which Brown acquired by the first clause of the contract. Against that property or asset there is no counter-claim, set-off or cross-demand. Baldwin owed it at the time the sale was made, and he owes it yet; and the averments of the cross-bill distinctly and repeatedly set forth the fact, that the Baldwin account was one of the assets, and an important one, to which the attention of both Langdon in his life-time and of his executors after his decease, had been frequently called.

If it be admitted that an account against an individual then held by the firm, was subject to a set-off held by such individual debtor against the firm, and that, by the the first clause, Brown would only acquire the undivided half of the balance due from such debtor, such concession would not affect at all the position we are now seeking to maintain; for that, here, Baldwin has no set-off against the asset held theretofore by Brown & Co. against him, and the undivided half of which was by the first clause transferred to Brown. So that by this first clause Brown became the owner of all of the claim or asset against Baldwin, and that asset was a right to enforce payment from Baldwin, and in case it could not be collected from Baldwin, then the right arose to hold Langdon liable upon his guaranty.

We have then a clear case of a sale by a joint owner of an asset or liability, of his interest therein to his co-owner, whereby such co-owner becomes the absolute and entire owner of the asset or liability so transferred. He must, therefore, be the absolute owner of it and be clothed by such transfer with the legal or equitable right to enforce every remedy which attached thereto. The vendor of such an asset or liability could no more resist the performance of his guaranty thereof to his vendee, than can the transferrer of a promissory note, upon which he has indorsed his guaranty. If the transferee of such note may hold the tranferrer liable upon his guaranty thereof, so may Brown in this case hold the transferrer of this asset, liability or evidence of indebtedness, responsible upon his guaranty thereof.

We submit that it is clear beyond any reasonable question, that by the very terms of the first clause of the contract, Brown became clothed with all the rights of absolute owner of that asset, together with all its incidents, including the guaranty of Langdon.

But it will be claimed, doubtless, that Brown, by the terms of the subsequent clauses of the contract, has discharged or released Langdon's executors from the liability which would otherwise by the first clause have attached to or remained upon them.

And this renders it necessary again to examine successively

the several conditions or obligations contained in the second paragraph of said contract.

The first clause is as follows: "Subject, however, to all taxes and assessments thereon now made or hereafter to be made." This language was properly used, and cast upon Brown the obligation to pay all the taxes and assessments then or thereafter made, which taxes and assessments are a necessary incident to all property. And there was, therefore, in this case, as in all sales of property, a necessity for the use of that language and the existence of facts to which the language properly applied, and relieved the executors from liability, which was by this language wholly cast upon Brown.

The next clause is as follows: Subject "to all indebtedness therefor." Whatever was owed by the firm for any of its property, (and the cross-bill shows that there were outstanding obligations,) was by this language made, as between the executors and Brown, the personal indebtedness of Brown—without this language the executors would have remained liable for one half the indebtedness; and the existence of such indebtedness shows the necessity for the use of the language, and a subject matter to which it is properly referrible.

The next is: And subject "to all liability of said firm or of the members thereof for transactions in the business of the firm in tort and contract." The averments of the cross-bill show that there were liabilities of the firm on account of the firm transactions, and that important litigation was pending or thereafter arose. This language evidently was intended to cast upon Brown the obligation to discharge all the liabilities of said firm and of the members thereof for transactions with third parties in the business of the firm, whether such liability arose in the nature of tort or contract. There were facts existing in connection with the business of the firm and the then condition of its affairs, to which this language was pertinent and which rendered its use in this contract necessary in order distinctly to show that such liability was to be discharged by Brown alone. The language does not and cannot refer to the guaranty upon which the cross-bill is based.

The next sentence is: "And subject to all judgments against

the said firm, or any member thereof, recovered or to be recovered, and all costs, disbursements, officers' and counsel fees."

The averments in the cross-bill show that litigation was pending, and necessarily in connection therewith would arise a liability, and in some instances a liability upon judgment had then arisen, as well as for costs, officers' and counsel fees. In short, this language finds in the facts set forth in the cross-bill a subject-matter to which it is both fairly and necessarily referrible, and there is nothing in this language which can in any sense, reasonable or otherwise, be applied to the guaranty by Baldwin of Langdon's account.

The next sentence is: And subject to "all liability for contribution to any other partner or person in consideration of moneys paid or to be paid upon any liability." It is averred in the cross-bill that at the time of the organization of the firm of T. E. Brown & Co. one J. S. Baldwin was a partner upon condition that he should furnish a certain amount of capital to said firm, and that subsequently both Langdon and Brown determined for themselves that Baldwin had not furnished the capital requisite to entitle him to be considered a partner, but which claim of Langdon and Brown was not conceded by Baldwin. And it is to this averment of fact contained in the cross-bill that the language under consideration is referrible. It was used in view of those facts, and very pertinently applies thereto. The language was necessary in order to cast upon Brown the liability to pay the whole of any contribution to Baldwin as a partner or to Baldwin as a person. Without the use of that language, Langdon's liability, or that of his executors, to Baldwin for any claim for contribution to him, which should be thereafter found to exist by reason of his claim to have been a partner or otherwise, would have remained. Certain it is that the language we are considering cannot, by any possibility, have reference to the guaranty in suit.

The next clause is as follows: "Of, from and against all o which real or possible liabilities, and of, from and against any other liability growing out of the transaction of said firm, said Brown agrees to fully indemnify and save harmless the executors, heirs and next of kin of said J. Langdon, deceased." The

first part of this sentence simply groups together but does not enlarge all the matters contained in the several sentences which we have just been considering, and it shows that whether those liabilities were then real or only, in the future, possible, Brown was to respond in full and the executors were not to be liable thereon. The following language, to-wit: "And against any other liability growing out of the transactions of said firm," would, of course, refer to any other *such* liability, that is—any liability to third persons growing out of the transactions of said firm with said third persons.

But the final language, to-wit: "Said Brown agrees to fully indemnify and save harmless," shows that the language was not, nor was any part of it intended to apply to the guaranty in suit; for the guaranty is not a liability by the executors to a third person, against which Brown could or should indemnify, but it was a liability to Brown, who has now become the owner in full of all the assets of T. E. Brown & Co., upon which Langdon was liable; and Brown would not and could not, in any legal sense, indemnify Langdon's executors against the same. His only way to relieve them from liability was by a release or discharge.

The language, therefore, finds in the facts set forth by the contracts themselves and the averments of the cross-bill, subject-matter upon which to feed, and which exhibits the pertinency and propriety of its use, and which will exhaust its entire meaning and force, without leaving any part of it whatever to apply to the release of the executors from the guaranty upon which they are, by the cross-bill, sought to be made liable.

But to proceed further with the language of the contract in the next clause or paragraph thereof. The first language therein is as follows: "And said Brown further agrees to pay and discharge any just and legal claim of any person or persons whomsoever, for any share of the profits or proceeds of the business of said firm, whether said claim be against the said firm or against the said Langdon, deceased, individually." We have shown, in the discussion of the language before considered, the fact, as is abundantly shown by the averments of the cross-bill, that Baldwin was originally a partner in the firm

of T. E. Brown & Co., and there had been no agreement by him whereby he had released his claim as partner to the profits of said firm. He had, it is true, by the determination of Langdon and Brown, been excluded therefrom, because, as they claimed, he had not performed the condition upon which he was entitled to share therein. And the language we are considering, only shows the great care and definite specification, both by the executors and the skilled attorney who drafted for them the contract, to enumerate every liability, which Brown assumed, even to the extent of repeating, in more comprehensive language, that which had been before more concisely stated, And this particularity of specification becomes strong and convincing evidence that the guaranty in suit was not intended to be released, because it was not mentioned either in terms or by language even indirectly applicable thereto; while the liability to Baldwin as a claimed partner in said firm was twice mentioned very pertinently in the contract. It was an important liability and one which the executors supposed that Baldwin might maintain, and therefore they require, and their attorney put in the contract a repetition of the language, showing that, as respects the liabilty of the firm to Baldwin as partner, they should not be held, but that Brown alone should discharge the whole of it; this was evidently done in order that Baldwin might thereby be enabled to pay in full his debt to the firm and thus relieve the executors from liability on the guaranty. If it had been the purpose to release Langdon from this guaranty now in suit, it is most manifest, it seems to us, that while the executors had been frequently advised of the claim of the firm against Baldwin, and for which they were liable as guarantors, they would also have inserted in this same connection, that they were not in any event to be held liable upon that guaranty. They provided specifically and twice in the contract, that Brown should discharge any liability of either Langdon or the firm to Baldwin; and that subject must necessarily have brought to their attention the liability of Langdon to the firm for Baldwin as the guarantor of his account; and if it had not been distinctly understood that they were not to be released from that guaranty, it is clear to us, and we submit, that the care and skill

manifest in the framing of the contract would certainly have caused to be inserted in it the discharge or release from such guaranty.

In view of the relation of the two subjects, to-wit, of the liability of Langdon to Baldwin for his share in the profits, and Baldwin's liability to the firm, upon which Langdon was guarantor, and in view of the fact that the one liability could not be considered and discussed without suggesting to the mind the other, the averment of the cross-bill in respect thereto becomes very pertinent and important. It is as follows:

> That the guaranty of the said Langdon was always recognized and treated by him as an individual guaranty, made upon his own personal account and not as any part of the firm's business or as necessarily or properly connected therewith. That at the time of the purchase of the interest in said Langdon's estate from his executors, as hereinbefore stated, it was believed, or at all events there was a hope and a probability, that something at least upon the balance due from said Baldwin's account, and possibly all, might be collected or in some manner realized from said Baldwin, and that said claim against said Baldwin was spoken of and was the subject of conversation between the parties at the time of the purchase, *and the same was not settled or adjusted or understood to be embraced in the terms of the settlement*, for the reason, among others, of the hope that the same might be realized, in whole or part, from said Baldwin. And your orator, therefore, *distinctly avers, as a substantive and existing fact*, that the claim upon Langdon's executors by reason of the guaranty *was not embraced* in said settlement, nor intended to be embraced, but was omitted therefrom for adjustment between the parties in case the said Baldwin should fail to pay any portion of said balance against him.

The concluding language of the contract, upon this branch of it, is as follows: "All the aforesaid agreements of indemnity to apply not only to liability growing out of the transactions of said firm, but also to any possible liability growing out of the transactions of the predecessors of said firm."

It is averred in the cross-bill that the firm of T. E. Brown & Co. acquired certain paving contracts, made by other firms with the city of Memphis, from said firms by assignment; and this language was used for the purnose of requiring Brown to indemnify Langdon from any liability growing out of the transactions of such other firms. And as if to show beyond all question that the contract of Brown was not one of release or discharge, but only one of indemnity, the draughtsman, by the

clause under consideration, and by the use of the langurge "all the aforesaid agreements *of indemnity*," shows that it was then distinctly understood that there was no clause of *release* in said contract, but that all of Brown's undertakings were undertakings of indemnity to the executors against liability to third persons.

We have thus called the Court's attention separately to each clause or phrase of the undertaking by Brown in the light of the surrounding facts, and we submit that we have shown that every clause or phrase was applicable to other facts set forth by the contracts and the cross-bill, and that the language used was requisite in order to secure the executors against the several liabilities to which the language of the contract referred; and that every clause and phrase of the obligations by Brown has legitimate, direct and necessary reference to other known and existing facts, and that the language used is not only rireferble to them, but is not fairly or properly referrible to any other matter. And thus we have the subject matter upon which every clause or phrase of the contract can and must feed for its support, and we find no clause in the contract left to be applied to the guaranty by Langdon, to the firm, of the Baldwin account. Without here endeavoring to show the technical legal construction of the language used, we have endeavored to show, and we submit, successfully, that the language used in the contract was necessarily used as applicable to, and its full meaning was exhausted by the other known and averred facts existing in the case. Having thus shown a proper and full appropriation of the language used to the other subject matter connected with the transaction, it follows, as a logical sequence, that the language was not used with reference to the guaranty in suit, and that it cannot, therefore, by any fair rule of interpretation, be held to apply thereto.

We have, then, by the contract on the part of the executors, a sale and transfer by them to Brown of one undivided half of the assets theretofore held by the firm against Baldwin, whereby Brown became the full and absolute owner thereof. As such owner he has a right to enforce the same with all its incidents, whether of guaranty or otherwise, against any person liable

thereon, unless he has by his contract released such person from liability; and we have seen that there is no language in Brown's undertakings which can be held to constitute such release; and, indeed, that he used no language except that which was pertinent, necessary and proper to indemnify against other claims than the guaranty; and that language is all appropriated to the other and surrounding facts of the case, leaving no part of it to apply to the guaranty in suit.

In the former part of our argument upon the demurrer to the cross-bill, we have sought to show that the language used by Brown, when properly interpreted, could not include the guaranty in controversy, and by the latter part we have sought to show that *all the language used* is necessarily and properly appropriated to the other facts and liabilities developed in the case, and that there is nothing left to apply or refer to the guaranty in question.

One further word, anticipating what perhaps may be said on the other side and we have done. It will doubtless be asked here as in the court below, why, if the Langdon estate was to be still held on this guaranty, did Brown agree to pay money; give his negotiable notes and convey lands; in all to the amount of $100,000. Why did he, in other words, part with so much and assume so large a liability, with this claim of then over $30,000 in his favor against the estate? And so too it may be asked, why did he afterwards pay the $50,000 evidenced by his notes without setting up this demand or insisting upon it as a counter-claim or set-off?

To these suggestions we answer:

1. Will it be claimed that it was not perfectly competent for Brown to so contract? That is to say, if these parties had in terms agreed that this guaranty should remain open and unsettled; that Brown should pay so much as he did for Langdon's interest "in or to the undivided property or assets," no one would claim that he could not now recover against complainants the amount unpaid upon the Baldwin debt. It will therefore be seen that the inquiries above suggested and to which we are now replying, are of no value unless they are based upon something inhering in the language of the contract itself. For,

if the language used operates as a release of this guaranty, then there is an end of the controversy. If it does not, then the *mere improbability* that Brown would undertake to pay his money with this liability unsettled, can not by necessary logic affect the contract itself as actually made. And lest these possible suggestions from appellee may have greater weight by reason of the amount involved than they would otherwise be entitled to, we beg to call your Honor's attention to the fact that when this contract was made the amount due from Baldwin was not $43,000, but about $32,000. The added amount, or about $11,000, being interest accumulating from March 17, 1869, to August, 1876, (fol. 50.) So that the amount thus left unsettled was not so large after all, in view of the many heavy transactions of this firm.

2. But there are still other, and, if possible, more cogent answers to these inquiries.

At the time Brown took this assignment from the executors, Langdon's guaranty of the Baldwin account was in no condition for adjustment, and this because there was still a hope of collecting something of Baldwin. And since, as we have seen, Langdon's liability was not direct, certain or fixed, nor indeed original, but one contingent upon Baldwin's failure to deliver the lumber, without any time named; it is but too apparent that until the executors were well assured and satisfied that the principal debtor would not and could not fulfill his contract they would not, and, in fact, could not safely settle that liability. They were acting in a representative capacity; were answerable for their acts to those interested in the estate, and to settle a secondary liability for so large an amount until that of the estate was fixed or established beyond fair doubt would have been, to say the least, unusual and probably have subjected them to litigation and controversy with those beneficially interested. At all events it was not then settled what Baldwin was owing nor that he could not or would not pay.

Not only so, but your honors will bear in mind that though Langdon and Brown counted Baldwin out of the firm by reason of his failure to pay as agreed, he (Baldwin) had never assented to this. Therefore it was that as Baldwin was claiming that there were profits coming to him from the firm and which,

if sufficient, might discharge his entire liability, you will see that there was nothing more natural or reasonable than that their executors would be unwilling to settle under such circumstances for the secondary liability upon the guaranty. The very language of the contract was indeed, a postponement of settlement to await the adjustment of this among other liabilities. For it is expressly provided that Brown shall protect them against claims for *partnership profits.* And since, if it should turn out that the firm owed Baldwin for such profits, the amount so owing would apply to the reduction or extinguishment of this guaranty or liability, and thereby discharge the estate, nothing would be more reasonable or probable, nor indeed more just than that the executors should insist upon leaving the question of liability under the guaranty for future adjustment, depending upon Baldwin's claim for profits, which claim Brown was to meet and discharge. Suppose Brown had insisted upon the settlement of the guaranty, would not the executors most reasonably have said there will be time enough to settle this when it is definitely ascertained that it has not been paid by profits or not paid by Baldwin, the primary debtor? It has since, however, as appears by the cross bill as amended, been definitely settled that Baldwin is not entitled to profits—he has executed a release of all such claims—he is hopelessly insolvent and there is no longer any hope or legal probability of ever collecting from him a dollar of this debt; and now for the first time comes the day, and the first proper and appropriate day for settlement upon this guaranty, and we need hardly add in this connection, that the whole question as to the amount due and the liability of Langdon upon his guaranty, whether growing out of Baldwin's insolvency or otherwise, can be fully and completely adjusted and settled in this case; and in addition to this it appears according to the averments of the cross bill that this guaranty was always treated by Langdon as his individual undertaking, made upon his own account, and not as any part of the firm business. It is also averred that there was a hope at the time this contract was made that something, at least, might be realized from Baldwin on this account, and that the account so guaranteed was the subject of frequent conver-

sations with Langdon in his lifetime, and especially with his executors at the time of the contract of purchase, and that the same was not settled nor adjusted, nor intended to be embraced in the terms of such purchase and contract. It is also averred that in the then complicated condition of the firm affairs, which had been imperiled for Langdon's benefit, (into which firm, by the way, Langdon went more with the hope of saving to himself what he had indorsed for, than to make profits, he remaining at his home in New York, and wanting a man of energy, experience and business capacity adequate to the great undertaking, to be upon the ground, and which man he found in the respondent Brown,) we say that it is averred in this condition of affairs Langdon's interest in the assets without the Baldwin account, so guaranteed was a grossly inadequate consideration for the $100,000 paid the executors. Under such circumstances and in view of the averment that this guaranty was not adjusted nor intended to be, what weight should be attached to the claim that the settlement must have included the guaranty? In the first place the language does not embrace it. In the next place we show reasons why it could not well or reasonably be embraced. And finally have averred in clear and explicit language that it was not embraced nor intended to be.

As to the argument which may be attempted, based upon the payment of the $50,000 in notes, "indorsed by B. F. Allen or other satisfactory indorser," (fol. 82,) there is an all-sufficient answer in the fact stated in the amendment to the cross-bill, (fol. 115,) to-wit: That these notes were negotiable; that they were collected by and paid to the indorsees, who took the same before due and who were *bona fide* holders and owners of the same. Of course we need not say that under such circumstances we were without right or opportunity to set off Langdon's liability on this guaranty against the notes so assigned, held and collected. Not only so, but if the notes had been held and payment demanded by the executors, there had not, as far as the record shows at the time of such payment, been a settlement with Baldwin, nor had it been ascertained what, if anything, he was owing upon the account so guaranteed.

Langdon was, in his life-time, we knew, a man of abundant

means. We knew, too, that his estate was amply able to respond to this liability. We knew, full well, that it was unsettled—that the executors so understood it, and the surprise of no one touching any transaction could have been greater than this respondent's when they set up, for the first time in this case, their most extraordinary and unexpected construction of this contract.

And so we submit, that in view of the averments of the cross-bill—which are to be taken and read as amended—this contract cannot be held to work a discharge of the liability set up by us. The demurrer was, therefore, improperly sustained, and upon both branches of the case we ask a reversal.

C. C. COLE,
G. G. WRIGHT,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

NO. 269.

OCTOBER TERM, 1880.

TALMADGE E BROWN ET UX, APPELLANTS,

v. } *Original Bill.*

JOHN D. F. SLEE, ET AL., EXECUTORS, APPELLEES,

AND

TALMADGE E. BROWN, APPELLANT,

v. } *Cross Bill.*

JOHN D. F. SLEE, ET AL., EXECUTORS, APPELLEES.

ON APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

BRIEF FOR ARGUMENT BY APPELLANT.

By C. C. COLE and G. G. WRIGHT, } *Of Counsel.*

STATEMENT OF THE CASE.

FIRST, *As respects the cause on the original bill.*

There is no controversy respecting the facts in this case. It is a peculiar and felicitous case, in that there is no testimony of witnesses, the facts are contained in written stipulations of the parties, and the whole controversy rests upon well defined legal propositions.

Prior to August 6, 1870, Jarvis Langdon and T. E. Brown were partners in the business of paving streets, &c., under the

firm name of T. E. Brown & Co. One J. S. Baldwin had a contingent interest in said firm, at its organization, but which interest was afterward forfeited. On said date, (August 6, 1870,) the said Langdon died at his home in Elmira, N. Y., and complainants afterwards qualified in said State as executors of the estate of said Langdon, deceased. On April 25, 1871, the complainants, as executors of J. Langdon, deceased, sold to the said T. E. Brown, by contract in writing, all the interest of said estate in the property of said firm. The only clause of the contract involved in the controversy, is this,—[1]

> Said Brown agrees to pay for such interest as follows:
>
> *First.*—Upon the assignment of the interest above mentioned, twenty-five thousand dollars ($25,000) in cash, together with the further amount of fifty thousand dollars ($50,000) in notes endorsed by B. F. Allen, or other satisfactory endorsers, and running from three (3) to eighteen (18) months, at a fair average time from these extreme points of time mentioned.
>
> *Second.*—A certain tract of land consisting of one hundred and thirty (130) acres, situated within the limits of the corporation of the city of Des Moines, Iowa, and also a certain plantation situated on White river, in Arkansas, consisting of sixteen hundred (1,600) acres of land, and all the buildings, improvements and appurtenances belonging thereto. In reference to the lands in Iowa and Arkansas, the purchaser hereby agrees, *that in five years from the date of this contract, he will, if the estate or its legal assigns so desire, purchase back the lands for twenty-five thousand dollars* ($25,000), *paying that sum in cash.*

The $25,000 cash was paid, the $50,000 of notes satisfactorily endorsed, were delivered, (and afterwards paid,) and the conveyances of the real estate were duly executed and delivered in accordance with the contract, and the executors conveyed to Brown the interest of Langdon in the partnership property. Afterwards the parties agreeed to exchange or to substitute a certain judgment for $5,000 held by Brown against Buena Vista County, Iowa, for the Arkansas land; which was done. No question, however, arises upon the exchange, and it is only mentioned here to prevent any confusion or misleading that might otherwise occur from the references to it in the pleadings, exhibits and decree.

Some two months after the purchase by Brown of Langdon's interest in the property, and on July 3, 1871, the complainants, as executors, leased to respondent, Brown, the said 130 acres of

(1) Printed record, pp. 36, 37.

land conveyed as aforesaid by Brown to them, in Des Moines, for five years from the date of said lease, which lease contained, among others, this condition:[2]

> The party of the first part reserving the right to sell said premises or any part thereof during the term above specified, and to give possession thereof to the purchaser; and it is agreed that such sale shall terminate this lease as regards the premises sold.

Nothing further occurred between the parties, and all matters remained in *statu quo* until the writing of this letter.[3]

" ELMIRA, Oct. 30, 1875.

T. E. BROWN, ESQ., Des Moines, Iowa:

Dear Sir:—My wife's health is so poor that I am obliged to go away with her, and I shall sail for Europe, Saturday next, for an absence of four, six or eight months. I have left all necessary papers for the closing of our matters, the redeeding of the Des Moines lands, and all other necessary business, with Mr. Slee. The balance of $25,000, less what has been paid on the Buena Vista county judgment, will be due April 25, 1876, and we shall desire the money at that time, as per contract. Yours truly,

C. J. LANGDON, Executor."

The stipulations in this case do not show when this letter was received by Brown. It was, however, probably received by due course of mail and within four days of its date. Nothing further passed between the parties, until the writing of the following letter:[4]

DES MOINES, 26th May, '76.

CHARLES J. LANGDON, ESQ.: Elmira, N. Y.:

Dear Sir: Your letter to me last fall in regard to the land did not seem to require an early answer, and I have delayed it until now. I shall not be able to pay you the money this year, and propose the following, which I trust will answer your purpose: 25th April, '77, $5,000, and a like sum on the 25th day of each April following, all unpaid sums to draw six per cent per annum from April 25, '76. The land to remain in your name until all is paid. The last payment would be a fractional part of $5,000, of course. This is small interest, but interest must in the future be less than it has been, and this is all I get on money that has been due longer than this has to you. There has been nothing paid on the Buena Vista judgment since remittance to you. The county are trying to have the same set aside for some informality or fraud, and may succeed, but I think not. Very truly yours, etc.,

T. E. BROWN.

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(2) Printed record, p 39. (3) Printed record, p. 40.
(4) Printed record, p. 40.

This letter was duly received by Langdon and he "answered said letter on the 31st day of May, 1876, and declined the proposition therein contained."[6]

Afterwards, and on June 26, 1876, and again on July 17, 1876, complainants tendered to respondent, Brown, a deed for the said 130 acres of land and demanded the payment of $25,000, less a payment received by them on the Buena Vista County judgment; and on the date last above, also offered to re-assign said judgment to Brown.[7]

The tender and demand were declined, and on July 19, 1876, this suit was brought. The Circuit Court, on June 10, 1878, rendered a decree, finding that respondent was indebted to complainants, in the sum of $26,320.37, and ordered the sale of the 130 acres of land as in case of foreclosure, to satisfy said sum.

The respondent appeals.

ASSIGNMENT OF ERRORS.

1. The Court erred in holding that the transaction was a mortgage.
2. The Court erred in holding that the complainants could recover without proof that they had tendered a deed on the day fixed for performance of the contract for re-purchase, to-wit, April 25, 1876.
3. The Court erred in rendering a decree for complainants; it should have dismissed the bill absolutely, with costs.

POINTS OF ARGUMENT.

In the argument of this case, it will conduce to perspicuity, for us to discuss the several propositions involved, separately, and in the order they seem naturally to arise upon the record.

I.

The contract sued upon is not a mortgage or security for the payment of twenty-five thousand dollars, but is a contract for the conditional re-sale of the land to Brown.

Conway vs. Alexander, 7 Cranch, 218, (*i. e.*) 237.
Robinson vs. Cropsey, 2 Edwards Ch. 137.
Robinson vs. Cropsey et al., 6 Page Ch. 480.

(6) Printed record p. 35. (7) Printed record pp. 35, 36.

Glover vs. Payn, 19 Wend., 518.
Flagg vs. Mann, 31 Mass., (14 Pick.) 467.
Hughes vs Shcaff, 19 Iowa, 335.
Rich vs. Doane, 35 Vermt., 125.
Turner vs. Kerr, 44 Mo., 429.
American Notes to *Thornborough vs. Baker* and *Howard vs. Harris*, in Leading Cases in Equity, Vol. 2, Part 2, pages 1993–2006 (4th Am. from 4th Lond. Ed. 1876).

II.

The contract being a conditional sale, and unilateral—a mere option and wanting in mutuality—time was of the essence of the contract; and to entitle complainants to any rights thereunder, they must aver and prove performance or an offer to perform—that is, both an election to sell and the delivery or a tender of the deed on the day fixed for performance.

First. As to the meaning of the words "in five years from the date of this contract," see

Goldsmith vs. Guild, 92 Mass., (10 Allen,) 239.
Magoffin vs. Holt, 1 Duvall, 95.

Second. That time is of the essence of such a contract, see

Taylor vs. Longworth, 14 Peters, 172, *i. e.* 174.
Young vs. Daniels, 2 Iowa, 126, *i. e.* 129.
Ruemmington vs. Kelley, 7 Ohio, 432.
Scott vs. Field, Ibid, 424.
Benedict vs. Lynch, 1 Johns Ch. 370.
Hatch vs. Cobb, 4 Johns Ch., 559.
Kirby vs. Harrison, 2 Ohio State Rep., 326.
Hepwill vs. Knight, 1 Younge & Collyer, 401, *i. e.* 415.
Parkin vs. Thorold, 16 Beavan, 50.
Tilley vs. Thomas, 3 Law Rep. Ch. App. Cases, 61.
Jennisons vs. Leonard, 21 Wall., 302.
Goldsmith vs Guild, 92 Mass. (10 Allen,) 239.

Third. The contract is unilateral, and time is necessary and always of the essence of such a contract. See

Leading Cases in Equity, in *Seton vs. Slade*, in Vol. 2 part 2d, (Fourth Am. Ed., 1877,) pg. 1129 and 1132.
Kerr vs. Purdy, 51 New York, 629.
Maughlin vs. Perry, 35 Maryland, 352, 360.
Jones vs. Noble, 3 Bush. 694.
Magoffin vs. Holt, 1 Duvall, 95.
Brooke vs. Garrod, 3 K. & Johns, 608; 2 De Gex & Jones, 62.
Austin vs. Tawney, 2 L. R. Ch. App. 143.
Fissler's Appeal, 25, P. F. Smith, 483; see *Estes vs. Furlong*, 59 Illinois, 298, 300.

Fourth. Before complainants can have any *right* under the contract, they must own and prove both an election to sell and performance or tender of deed on their part. See

Kent's Commentary, Vol. 4, p. 144.
Washburn Real Property, Vol. 2, p. 56 (marg. 492), sec. 14, (ed. 1876).
Hoopes vs. Bailey, 28 Miss., 328.
Wells vs. Smith, 2 Edward's Ch., 78.
Same case on appeal, 7 Paige's Ch., 22.
Hutcheson vs. Heirs of McNutt, 1 Ohio, 14, *i. e.* 18-21.
Scott vs. Field, 7, Ohio, 424.
Kirby vs. Harrison, 2 Ohio St. 326.
Kemp vs. Humphreys, 13 Ills., 573.
Westerman vs. Means, 12 Penn. St., 97.
Bodine vs. Glading, 21 Penn. St. 50.
Barrel vs. Sabine, 1 Vernon, 268, 1684.
Joy vs. Birch, 4 Cl. & F., 57 *i. e.* 73-4, 1836.
Wells vs. Smith, 7 Paige's Ch., 22, 1837.
Brooke vs. Garrod, 3 K. & Johns, 608, 1857.
Same case on appeal, 2 DeGex & J. 62, 1857.
Perry vs. Meddowcroft, 4 Beavan, 197, 1857.
Lord Ranelagh vs. Melton, 34 Law Jour., Eq. 227, 1865.
Weston vs. Collins, 34 Law Journal, Eq. 353, 1865.
Austin vs. Tawney, 2 L. R. Ch. App. 143, 1867.
Scott *vs. Britton*, 2 Yerger, (Tenn.) 215 *i. e.* 223, 1828.
[illegible]ey vs. Thomas, 3 L. R. Ch. App., 61, 1867.
[illegible]an vs. Cantrell, 9 Yerger, 172, *i. e.* 185, 1836.

Magoffin vs. Holt, 1 Duvall, (Ky.) 95.
Jones vs. Noble, 3 Bush, (Ky.) 694, 1868.
Galt vs. Jackson, 9 Ga., 151, 1850.
Corson vs. Mulvaney, 49 Penn. St., 88, 1865.
Stinson vs. Dousman, 20 How., 461, *i. e.* 466, 1857.
Smith & Fleek's Appeal, 69 Penn. St., 474, 1871.
Maughlin vs. Perry, 35 Md., 352, 1871.
Estes vs. Furlong, 59 Ills., 298, 1871.
Kerr vs. Purdy, 51 New York, 629, 1872.
Lord Ranelagh vs. Melton, 34 Law Journal, 227.
Scott vs. Shepherd, 3 Gilman 483.
Stow vs. Russell, 36 Ills., 18.
Bank of Columbia vs. Hagner, 1 Peters, 461.
School Dist. vs. Rogers, 8 Iowa 316.
Berryhill vs. Byington, 10 Iowa, 223.
Winton vs. Sherman, 20 Iowa, 295, and cases cited.

III.

The letter written by Langdon, one of the complainants, to Brown, the defendant, of date Oct. 30, 1875, (six months before the time fixed for either election or performance), cannot in any way affect the rights of the parties; for that, it was not provided for in, or contemplated by the contract; it was not the act of all the executors; it was gratuitous, and not binding upon any one; it was not, by its terms, an election: it was not true.

Hertel et al. vs. Bogert et al. 9th Paige's Ch. 52.
Smith vs. Whiting, 9 Mass., 334.
Leading Cases in Equity (*Seton vs. Slade*), Vol. 2, pt. 2, page 1132 (4th ed., 1877).
See also *Story on Sales*, Sec. 250, and cases cited in notice.

IV.

The letter written by Brown, of date May 26, 1876, to Langdon, one of the complainants, does not at all affect the rights or liabilities of the parties, for that it was not a waiver; it was

without consideration; it very unmistakably refused to perform the contract; it made a new proposition, which was declined.

Bank of Columbia vs. Hagner, 1 Peters, 455, *i. e.* 467.
Ripley vs. Etna Ins. Co., 30 N. Y., 136, *i. e.* 164.
Underwood vs. Farmer's Ins. Co., 59 N. Y., 500, *i. e.* 506.

H reversal is asked.

STATEMENT OF CASE ON CROSS BILL.

By the cross bill as amended (Folios 45 to 62 and 113 to 120) it is alleged that Langdon in 1867 was indorser for one John S. Baldwin on a large amount of commercial paper—had paid and was liable to pay for him near one hundred thousand dollars, and was liable also in a large amount for others connected in business with said Baldwin—that all the persons for whom he had thus endorsed in that year became embarrassed—that Langdon was liable to loose on account of his endorsements having no security except Baldwin's interests in certain paving contracts, &c. In this crisis of affairs the partnership of T. E. Brown & Co. was formed for the purpose of buying out all the several interests of those connected with Baldwin in said paving contracts—by the terms of which partnership Langdon was to furnish all needful capital beyond that which Baldwin was to furnish, and Brown was to take charge of the business—the profits to be divided one-third each to Langdon, Brown and Baldwin, in case the latter kept a certain amount of capital in the business. Baldwin failed to keep his part of the contract and thereby forfeited his interest as claimed by Langdon and Brown and they agreed to share profits and losses equally. After this, in 1868, Langdon having and holding demands against Baldwin in his individual right for money loaned and advanced, interest thereon, &c., to the amount of over $87,000, sold and transferred the same to the firm of Brown & Co., and guaranteed their payment in writing, and undertook that Baldwin should pay the same by delivering lumber, &c.—that a portion of the debt was paid by Baldwin in lumber—that there remained due, on the account so transferred and guaranteed, however, in April, 1871.

about $32,000, and with its interest in August, 1876, about $43,-000. In April, 1871, (Langdon having deceased in 1870) Brown, the survivor, purchased of his executors all the right, title and interest of said Langdon in and to the undivided property or assets of the late firm as shown by the contract, (Folio 81, et seq.) by which Brown bought this liability of Baldwin thus guaranteed by Langdon to the payment of which he was justly entitled from said Langdon. It is further alleged that Baldwin continued to claim an interest in the firm and to profits, &c. But afterwards, to-wit, in August, 1876, Brown settled with Baldwin by which it was found that Baldwin was indebted to the amount set up herein or the accounts so transferred and guaranteed. That he so admitted in writing, and also released the firm from all claims for profits against the executors of Langdon. The bill further avers that Brown did not set up this claim against the notes for $50,000 mentioned in the contract because they were negotiable, had passed into the hands of innocent holders, &c. And because also that at that time he had not settled with Baldwin nor obtained any release of profits, &c. During all this time there was a hope of collectieg something of Baldwin, who is now, however, insolvent. It is averred that this claim was Langdon's individual guaranty—frequently recognized by him and relying upon his promise to make it good, he was permitted to draw from the firm large sums of money; that credit was given to him upon the distinct and unqualified understanding that Baldwin would deliver all the lumber as agreed; that this claim was one of the assets for which Brown paid the $100,000 mentioned in the contract, and there was no intention by any one at the time of making said contract that the executors were to be released from said guaranty. That at the time nearly all the firm assets except the Balnwin account were in serious litigation, and that Brown was largely moved to make said purchase on account of the Baldwin claim which he regarded good with the guaranty of Langdon and extremely doubtful without it. The bill also states that in the then complicated condition of the firm affairs, Langdon's interest in the assetts at the time of the purchase, without the Baldwin account, was a grossly inadequate consideration for the

amount paid, and that a construction of the contract which would release Langdon's executors from said guaranty would be inequitable and unjust, and contrary to its letter and spirit. That this guaranty had no relation whatever to the business of the firm or with its transactions. That it was not an advancement by Langdon of the capital that he was to furnish. That at the time of the purchase from the executors, this claim was the subject of conversation, and it was not settled, nor intended to be, for the reason, among others, of a hope that something might be realized from Baldwin. And so it is alleged as a substantive and existing fact, that this claim was not embraced in said settlement, nor intended to be, but was omitted for adjustment in case Baldwin should fail to pay any portion of the same.

To the bill, as amended, there was a demurrer, (fol. 123), for the reason in substance, and the only ground passed upon by the court below, that the written agreement of April 25, 1871, was an express release and settlement of all matters between the parties, especially the Baldwin demand which it is claimed by us was so guaranteed. The demurrer was sustained and it is from this ruling on the second branch of the case that Brown appeals.

ASSIGNMENT OF ERRORS.

1. The court erred in sustaining this demurrer.

2. The court erred in holding that by the terms of the contract of April 25, 1871, Langdon's liability on his guaranty was released and that our claim therefor was thereby discharged.

BRIEF.

I.

There is nothing in the language of the contract which by any fair intendment includes this guaranty.

1. The intention of the parties will be carried out so far as the rules of law and language will permit, and it is always of the greatest service to look at the intention of the parties as also the property which is the subject matter of the contract, and their intention in making it. 2 Par. on Cont. 499, *et seq.*

2. While a new contract will not be made, yet the one party will be held to that construction of it which he knew the other party supposed the words to bear.

Barclay vs. Lucas, 1 D. & E. 157.
Wright vs. Russell, 2 Wilson, 530.
Pars. on Cont., 499–501 and note.

3. Where there are recitals of particular claims or considerations followed by general words, the general words will be restrained by the particular ones.

Paylor vs. Homersham, 4 M. & S., 426.
Lyman vs. Clark, 9th Mass., 235.
Simons vs. Johnson, 3 B. & Ald., 175.
Rich vs. Lord, 18 Pick., 325.

And recitals have a great influence in the interpretation of other parts.

Moore vs. McGrath, Cowp., 9.
Cholmondeley vs. Clinton, 2 B. & Ald., 625.
Pierce vs. Parker, 4 Met., 80.
Lyon vs Hart, 2 Con., 120.
Knight vs. Cole, 3 Mod., 277.
Thorpe vs. Same, 1 Ld. Raym., 235.
Butcher vs. Same, 4 B. & P., 113.
Morris vs. Philpot, 2 Mod., 108.
Coles vs. Heim, 8 B. & C., 568.

Litc. Rep., 345.
Hob., 108.
5 *Bac. Ab.*, 710.

4. Where the same contract is executed by various persons standing in various relations and having various claims against releasee, the general words, though the most broad and comprehensive, are to be limited to particular demands. This is always so where it appears from the recital, from the nature and circumstances of the several demands, to one or more of which it is proposed to apply the agreement, that it was intended to be limited by the parties.

Rich vs. Lord, 18, Pick., 325.
Jackson vs. Stackhouse, 1 Cow., 126.
Paylor vs. Homersham, 4 M. & S., 423.

5. By *guaranty*, is understood a contract by which one person is bound to another for the due fulfillment of a promise or agreement of a third party, (2 Pars., 3.) And this was Langdon's contract with Brown.

6. *Indemnify*. To make or save harmless—to save against loss or damage. This was all that Brown undertook by this contract.

7. *Release*. The giving or discharging of a right of action or claim which a man hath or may have against another.

Shep. Touch., 320.

8. Each partner is bound to account to the others for all that he owes to the firm, deducting what is due him from the firm. *Story on Part.*, 184.

9. There is no right of contribution between wrong doers, and this is as applicable to partners as to others.

Story on Part., 220.
Pearson vs. Skelton, 1 M. & W., 506.

10. This guaranty was not a liability *of* the firm, but one *to* the firm, and it was only as to the former that Brown agreed to indemnify these executors. He took the undivided assets *subject* to these firm liabilities, and by no possible logic *subject* to what was owing to the firm. To all that was owing to the

firm by any person, whether Langdon or any one else, he was entitled, especially where it was evidenced by Langdon's individual, outside and independent contract. The contract to sell had reference to Brown's liability for firm debts and of each member thereof, by reason of his relation to the firm, and to this alone.

II.

Every clause of this contract is referable to other and different transactions or liabilities than the Langdon guaranty.

1. The liability in the guaranty was not direct, certain and fixed, but contingent, and so remained at the time of the contract. It was not a transaction of the firm against which the indemnity provided.

2. The executors did not sell Langdon's interest in the partnership, but made a specific sale of his interest "in and to the undivided property or assets" as also a claim against Brown held by Langdon, amounting to $17,000. And hence under the first clause of the contract, without more, the executors would still be liable for firm debts, etc.

3. Brown, by his purchase, became the absolute owner of the Baldwin claim as one of the assets and as a part of the undivided property of the firm, etc.

4. An obligation to pay taxes and assessments—to meet the debts of the firm or its liabilities or judgments against it, or liabilities to contribution, or for a share of the profits or proceeds of the business, is not an obligation to either pay or release this guaranty. And as Brown's agreement to indemnify only refers to these taxes, liabilities, etc., it can not, if any regard is had to law language, be extended to this guaranty. The contract finds ample material upon which to feed without including this personal and individual debt of Langdon's, so transferred and guaranteed.

5. Every averment of the cross-bill is in harmony with the contract, and in the light of its averments—which must receive attention and consideration in aid of the fair interpretation of the contract—we submit that appellant was entitled to the relief prayed, and that the demurrer was therefore improperly sustained.

SUPREME COURT OF THE UNITED STATES.

NO. 269.

OCTOBER TERM, 1880.

TALMADGE E. BROWN, ET UX., APPELLANTS,

v. } *Original Bill.*

JOHN D. F. SLEE, ET AL., EXECUTORS, APPELLEES,

AND

TALMADGE E. BROWN, APPELLANT,

v. } *Cross Bill.*

JOHN D. F. SLEE, ET AL., EXECUTORS, APPELLEES.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

REPLY FOR APPELLANT.

By G. G. WRIGHT and C. C. COLE, } *Of Counsel.*

The errors of counsel for appellees, in respect of their statements of fact, seem especially to demand from us a reply in print. These errors concerning the facts, involve consequent errors in respect to the authorities cited and their want of pertinent application to the case, which also demand attention.

FIRST. Under the discussion "of the nature and character of the agreement which is the basis of the suit,"[1] counsel say the consideration for the transfer of the interest of Langdon to Brown was $100,000. This may not be an unreasonable deduction or inference. But the *contract itself*

(1) Arg. pg. 6.

says:[1] "Said Brown agrees to pay for such interest as follows:" $25,000 in cash; $50,000 in notes, endorsed by B. F. Allen; 130 acres of land in Des Moines, Iowa, and 1,600 acres of land in Arkansas. "In reference to the lands in Iowa *and* Arkansas," Brown agreed to re-purchase *in five years from the date of the contract*, paying $25,000 for *both* parcels of land—not for the Des Moines lands alone. Shortly after the first contract was made the parties entered into a supplemental contract whereby a certain judgment in favor of Brown and against Buena Vista County, Iowa, for $5,000, with its accumulated interest, was exchanged or substituted for the Arkansas land. But notwithstanding this exchange or substitution of the judgment for the Arkansas land, the contract for the re-purchase was to remain the same, and it was agreed that "the said Brown shall, *at the expiration of the five years stated in said* (original) *contract*," re-purchase the said Iowa land and the judgment, for $25,000. But it was agreed, as a consequence of the substitution of the judgment for the Arkansas land, and as necessary to maintain the perfect and just equality of the substitution, that if anything should, in the meantime, be paid upon the judgment, the executors should deduct the amount so paid, with the agreed seven per cent. thereon, from the $25,000 to be paid by Brown in case of re-purchase. And this, because Brown would receive, in case of re-purchase, the Iowa land and the judgment less the amount so paid.

This is here stated thus fully, in order to prevent a probable misapprehension of the real facts, from the statements and inferences on pages six and seven of appellees' argument, and to answer the question therein put as to how the court would account for the deduction of the payments on said judgment from the amount to be paid by Brown in case of re-purchase.

Brown did not remain in possession of the land under or by virtue of that contract, but took and held the same under a lease made several months thereafter.[2]

SECOND. A fundamental error of fact, in respect to the contract sued upon, and an error which, when corrected, renders the authorities cited by appellees' counsel either in-

(1) Printed record, pp. 36, 37. (2) Printed record, pg. 39.

applicable or fatal to complainants' case, is found on top of page nine of appellees' argument. We quote:

> Our first proposition of law is: That in order to make this contract an absolute obligation on the part of Brown to repurchase the land and pay $25,000 therefor, all that was necessary was that the executors, at *any time prior to* the expiration of the five years, should notify Brown, in the language of the contract, that they desired him to re-purchase, and that thereupon his obligation to pay the $25,000 became absolute.

The error or misstatement of fact is contained in the words "any time prior to," which we have italicised above. These words, if in the contract, would materially change the rights and obligations of the parties. *But they are not in the contract.* The same counsel who so misstate the contract in the above first proposition, had, on the two preceding pages, correctly stated the contract itself. We quote from page seven: "In reference to the land in Iowa and Arkansas the purchaser hereby agrees that *in five years from the date of this contract* he will," etc., etc. On page eight, in quoting from the supplemental agreement, whereby the judgment against Buena Vista County was substituted for the land in Arkansas, the same counsel state the contract correctly, as follows: "It is further understood and agreed that if the said executors desire it the said Brown shall, *at the expiration of the five years* stated in said contract," re-purchase, etc.

Why counsel thus state the matter of fact in their "first proposition" so different from what it is stated in the contract itself, even as copied by them, it may not become us to inquire or even to suggest. Hence, we forbear. But we submit to the court that the rule of law applicable to a contract as misstated by counsel in their "first proposition," is very different from the rule of law applicable to the contract itself, as contained in the copy thereof set out by the same counsel on pages seven and eight of their argument. For that, the rule, under a contract as stated in the counsel's "first proposition," would give complainants the right to make their election or desire, and notify Brown thereof at any time *during* the five years. While under the contract itself, that right is limited to one and *a particular day*, to wit: "In five years from the date of the contract," or "at the expiration of the five years stated in said contract of April 25, 1871," or on April 25, 1876.

THIRD. The language of the contract in *Magoffin v. Holt*, Duvall, (Ky.) 95, is identical with the language of the supplemental contract in this case. We quote them in parallel columns

That if, *at the expiration of three years from the date hereof*, the said Holt shall desire to sell the said land, Magoffin will purchase, etc.	That if said executors desire it, the said Brown shall, *at the expiration of the five years stated in said contract*, re-purchase the said land, etc.

In the Kentucky case the Court of Appeals expressly and directly discuss and decide the very question, and hold that the phrase used in the contract, to wit: "at the expiration of three years," means and was intended to mean, the day on which the period of three years expired. The court says the meaning is as clear as it would be in the case of an ordinary promissory note for the payment of a sum of money at the expiration of three years from the date. The same point is noted in several other cases cited by us in our opening argument. But it cannot be necessary to refer again to them here.

While, as we have shown, we think, in our opening, that the cases cited by appellees' counsel do not sustain their "first proposition," even with its misstatement of fact, yet it is worthy of note that in every case cited by counsel in support of their "first proposition," the party had "any time prior to" or "within" a specified time to elect or to perform. We quote from the statement of the cases as made by counsel in their argument, in support of this fact. In *Corson v. Mulvany*, the language used is "that if the said Mulvany shall desire to purchase the said tract of land *at any time prior to the first of April*, 1864," etc. In *Kerr v. Day*, it was "an agreement for a lease with the privilege of the purchase of the premises *at any time within three years*." In Smith and Fleek's appeal the purchaser was "*to have the refusal ten days from date*." The cases of *Moote v. Criven* and *Mattison v. Schofield*, each turn upon the question of fact, as to whether there was any contract between the parties—in the one there was not, and in the other there was, but time was not of its essence. In *Austin v. Tawney* the option of purchasing was given, with a provision that the purchaser "should have *two months, within which* he should enter into an agreement for the completion of the purchase," which he

did do within that time. The cases cited, merely, on page thirteen of appellees' argument, relate, mainly, to controversies between executor and heirs, as to the right to rents and profits of real estate, where an option to purchase was held by a third person, and the effect upon their respective rights of the exercise of such option. They do not bear upon this case, which rests upon the questions of the time and the manner in which the option must be exercised. *Bernard v. Lee* was a case of mutual contract, and not a case of option at all. In *Wilks v. Smith* the current payment of the half yearly interest was necessarily to be made before the vendor could be under any obligation to convey; the obligation to convey could not arise in the absence of express contract, until the time fixed for the payment of the consideration.

In all of the cases cited, however, wherein the option might be exercised *before the time fixed* for performance, the courts have uniformly *held* that the party thus exercising his option, *must also perform or tender perfomance* thereunder *at the time fixed therefor*, and in default thereof, all rights under his option, will be lost. It is just here that the complainants' case is fatally deficient, even if we should concede the correctness of counsels' theory respecting the rights to make their election at any time during the five years, and also that the election was made. But as we have seen, it was necessary under the contract in this case, and the law applicable thereto, that the complainants should have both made their election and tendered performance at the expiration of the five years, to-wit: April 25, 1876, and it is conceded, here, that they did neither. Even the giving of a notice on the very day would have been useless, without tender of a deed also.

In their review of cases cited by us, appellees' counsel, at the bottom of page fourteen, say:

> In the case of *Magoffin v. Holt*, 1 Duvall (Ky.) 95, there was no election and no notice within the three years. In that case the election, by the express terms of the contract, was to have been made at *the expiration of the three years* from its date.

Just so. And that is precisely, and *in hec verba*, the fact in the case at bar, and hence that case becomes conclusive upon this. The court in that case did not hold that it was

"a question as to the right of the purchaser, who has failed to comply with his contract within the time given him by contract for a re-purchase;" nor that it was *Magoffin's duty* to proceed with his purchase; "nor that" he must tender the money, for the payment of the money is a condition precedent to his right to a conveyance." But the court held that it was Holt's duty to make and notify his election on the day fixed, to-wit: "at the expiration of the three years," and having failed to do so, by such failure he lost all right to require Magoffin to make the purchase. Here, the complainants failed to make or notify Brown of their election on the day fixed, to-wit: "at the expiration of the five years stated in said contract," and by such failure they have lost all right to require Brown to make the purchase. The analogy of the two cases is not alone in principle, but it extends to the detail of facts and to identity of language.

FOURTH. Under this division of their argument, counsel say, that their election or desire to sell need not be made on the very day the five years expire; and this because "it is not so nominated in the bond." But we have just seen from the judicial determination in *Magoffin v. Holt* and other cases, that by the use of the language contained in the contract in suit, "it *was* so nominated in the bond." And, since it is not nominated in the bond, that Brown is to "have a reasonable notice before the expiration of the time," he is not entitled to any until the day arrives. He had, by the contract, five years' notice to prepare himself to complete the purchase, if, at the expiration of that time, the executors should so desire. This was all the notice required by either the contract or the law.

If, as counsel claim, the greater includes the less, in law, as in mathematics, or the notice was continuing, then the complainants might have notified Brown on the day the contract was made, that in five years they would desire him to purchase. This will not do! As well might an endorsee of a negotiable note claim to hold his endorser, because he notified him, at the time of the endorsement, that he should look to him for payment of the note. Such a proposition is neither good sense nor good law. The endorsee must give notice under the law at the time fixed

by his contract of endorsement. So must the complainants give notice at the time fixed by their contract. A failure to give such notice, will lose to either, the right which might have been acquired by giving it; and such loss is not attributable to the fault of the other party, or the law or the contract, but alone to the negligence of the party himself.

FIFTH. We have sufficiently discussed in our opening argument the effect of Brown's letter to Langdon of date May 26, 1876, and have shown, as we submit, that it constitutes neither a waiver nor an estoppel. The authorities cited by counsel for appellees, on pages nineteen and twenty of their brief, do not support their position. In *Webb v. Hughes*, time was not of the essence of the contract. The statement of the law as held in *Maginnis v. Fallow*, is not from the language used by the court, but is that used by the attorney in the case, and which the Chancellor did not approve. In *King v. Wilson*, time was not of the essence of the contract, and one party, by notice, sought to make it so, but, notwithstanding his notice, continued to negotiate from the time he gave the notice, down to and after the time fixed by it. Under such circumstances, of course, time never became of the essence of the contract. *Hunter v. Slade* is the same as *Seton v. Slade*, from which and the notes thereon in Leading Cases in Equity we cited so fully in our opening. *Thornton v. Wynn* and *Liffingwell v. White* are cases where the waiver occurred before maturity of note, and hence they are in perfect accord with *Bank of Columbia v. Hagner*, cited by us in our opening. In *Rogers v. Stevens* the endorser was held because the principal obligor had "no effects," and hence no damage from want of notice.

Clearly the letter was neither a waiver nor an estoppel.

CROSS-BILL.

It would appear that counsel have more hope of success in this part of the case by a studied effort to misrepresent and misstate the record than from an argument based upon the record itself. For instance, he states repeatedly that the guaranty was verbal, whereas the cross-bill states positively and unequivocally that it was *in writing*. We quote: "Complainant further states that this claim was Langdon's individual guaranty of Baldwin's debt to the firm *made in writing*, and has been repeatedly scheduled by the firm to Langdon and his executors, as a part of the assets of Brown & Co.,"[1] He also states that the executors had not knowledge of this guaranty prior to or at the time of the contract of April 25th, 1871.

We quote: That after the death of said Langdon said Brown as survivor fully advised said executors of said balance against Baldwin, including the Hungerford account, how the same arose, and of the decedents relation thereto, and that said Brown as survivor should look to them for some adjustment of the matter. * * * And that said claim still justly subsists in his favor against the executors of the estate of said Langdon, and has been, both by said Langdon in his life time and by his executors since said Langdon's death, acknowledged so to subsist."[2]

The cross-bill, also, states that they not only had such knowledge, but that it was expressly agreed that the claim thereon should be left open in view, among other things, of the hope that Baldwin might settle or adjust the same in whole or in part.

It is said that this guaranty of the Baldwin account is not claimed by the bill to have been mentioned at the time of the contract aforesaid. That is not true, for the cross-bill says it was mentioned.

By a strained effort, and what we suppose is claimed as argument, it is attempted to distort the language of the cross-bill to mean that the party spoke of the claim against

(1) Printed Record, pg. 44, folio 115, last part.
(2) Printed Record, pg. 20, folio 59.

Baldwin, and that it was the sole subject of conversation and was not settled, but that it is not averred that anything was said about any guaranty by Langdon—that the pleader obviously intended to avoid any reference to this guaranty. And this counsel do in the face of the positive averment of the fact that the claim upon Langdon's executors, by reason of that guaranty, was not embraced in that settlement, nor intended to be embraced but was omitted therefrom for adjustment between the parties in case Baldwin should fail to pay any portion of said balance against him, and in the face too of the averment that Langdon always recognized this as his individual guaranty made upon his own personal account; and of the further averment, that at the time of the purchase of the interest from the executors it was believed there was a probability that something might be made upon the balance due from Baldwin, and that this claim was the subject of conversation and was left unadjusted, and that the guaranty was not embraced in said settlement.

It is easy for counsel to say that Brown was to take the assets for better or for worse, and without any guaranty of them, and thereby attempt to deduce the conclusion that the guaranty by Langdon was included in such assignment or release. They studiously loose sight of the fact, or ignore it, that this guaranty of Langdon's was an outside transaction, and of the further fact that, if it was intended to release Langdon or his estate from the guaranty, there was a plain, easy and short method of doing it, and that was by saying so in the contract itself. Instead of doing this, however, there is provision for indemnity or saving the estate harmless as against certain specific things, which language of itself is conclusive against the claim now set up by them.

It is said that our claim is most unconscionable, and finds no support either in the letter or spirit of the contract.

We will be glad to know why. If there was this large indebtedness, if it was referred to at the time, if it was by agreement excluded and left unsettled, if the amount received by Brown aside from this guaranty was grossly inadequate for the sum paid, we say we would like to know why it would be so unconscionable, as claimed. It was per-

fectly competent for these parties to so contract that Langdon's executors should still be bound, and since this guaranty was outside, independent and individual, it is not to be regarded as included, unless the language employed makes it so or it so becomes by necessary implication.

In reply to the objection that the matter contained in the cross-bill is not cognizable here and in a court of equity, we answer that ordinarily it is unnecessary in a cross-bill to show such grounds of equitable jurisdiction as is required in the case of an original bill. There is certainly one exception to this rule, and that is where some affirmative relief is sought by the cross-bill, in which case the relief sought must be equitable relief; but where the matter set up in the cross-bill is defensive to the original bill, as where a set-off is claimed, it is not necessary that such defense should consist of claims which could be enforced in that court or in equity by an original bill. All that is required is that the claim set up in the cross-bill by way of defense to the original bill should grow out of the same *subject matter* with the claim in the original bill, and if this condition is complied with, it is immaterial whether the matter contained in the cross-bill would be available in equity in an independent suit or could only be enforced elsewhere in an action at law.

This doctrine is clearly expressed by Judge STORY in his work on Equity Pleading. He says, § 628: "A demurrer for want of equity will not hold to a cross-bill, filed by a defendant in a suit against the plaintiff in the same suit, touching the same matter. For being drawn into the court by the plaintiff in the original bill, he may avail himself of the assistance of the court without being put to show a ground of equity to support its jurisdiction, as a cross-bill is generally considered as a matter of defense."

The same doctrine is affirmed by other treatises on the same subject. Thus in 1 Smith's Chancery Pl. and Pr., p. 460: "But a cross-bill being generally considered as a defense, or as a proceeding to procure a complete determination of a matter already in litigation in the court, the plaintiff is not, at least as against the plaintiff in the original bill,

obliged to show any ground of equity to support the jurisdiction of the court." See, also,

2 Daniels' Chancery Pr., p. 1549;
Mitf. Eq. Pl. by Jeremy, 203;
Cooper, Eq. Pl., 81, 215;
Wickliffe v. Clay, 1 Dana (Ky.), 585;
Hume v. Long, 6 Mon. (Ky.), 116;
Cartwright v. Clark, 4 Met., 104;
Nelson v. Dunn, 15 Ala., 501.

Now, Brown by his cross-bill seeks to have his claim against the estate of Langdon set off against any claim which the complainants in the original bill may succeed in establishing against him, and to that extent the cross-bill is clearly defensive to the original bill, and under the rule above stated, it is immaterial whether the claim *per se* is of legal or equitable cognizance. All that is necessary is that it should be properly connected with the subject matter of the original bill. That legal demands may be set up in a cross-bill by way of set-off was decided in *Nelson v. Dunn*, *supra*, where the court say that the fact "that some of their counter-claims or deductions are cognizable at law, can make no difference. They are connected with the matter of the original bill. *Hume v. Long*, 6 Monr. Rep., 119; *Clay v. Wickliffe*, 1 Dana's Rep., 589. The complainant in the cross-bill, as against the complainant in the original bill, is not bound to show any ground of equity to support the jurisdiction of the court. 4 Met., Rep., 104; Dan. Ch. Pr., 1747; Story's Eq. Pl., § 399." The same doctrine was declared in *Cartwright v. Clark*, 4 Met., 104, although it was held that the cross-bill in that case could not be sustained on other grounds.

There can be no question but that the claim of the cross-bill is properly connected with that of the original bill, as both claims grow out of one and the same transaction, viz: The firm assets of Brown & Co. So that so far as the cross-bill asks to have the claim of Brown set off, against any claim which may be established against him, we submit that it is not obnoxious to the objection which we are now considering. It is true, Brown denies any liability to the com-

plainants in the original bill, and asks judgment for the full amount of his claim against them, and if he should sustain his position both by defeating the claim against him, and by establishing his own, there would be nothing to which his claim would be a set-off, and the foregoing argument might not apply; but that is a contingency which the complainants in the original bill are not at liberty to assume as a basis for their demurrer, as they cannot say by their bill that they have a just claim against the respondent, and by their demurrer admit that such claim does not exist. Consistency forbids it. Brown asks for a decree against the complainants in the original bill, for the excess of the claim over any that may be established against him by the complainants, and certainly the court after allowing him part of his claim by way of set-off, will not compel him to resort to an action at law to recover the balance, but will afford complete relief under the familiar maxim of equity jurisprudence. "That where equity obtains jurisdiction of a cause for any purpose, it will retain it generally until complete justice is effected." 1 Story's Eq. Juris., § 74, b.

Thus it is made clear that the jurisdiction of the court over the cross-bill, may be sustained on the ground that it asserts a claim by way of set-off, which is intimately connected with the subject matter of the original bill, without inquiring whether such claim could be enforced in a court of equity in an independent suit or as to the proper forum in which action thereon should otherwise be brought.

GEO. G. WRIGHT,
C. C. COLE,
Of Counsel for Appellants.

OFFICE SUPREME COURT U. S.
FILED
FEB 28 1891
JAMES H. McKENNEY, Clerk

Supreme Court of the United States.

No. 269.

T. E. BROWN AND WIFE, *Appellants*,

vs.

JOHN D. F. SLEE AND OTHERS, EXECUTORS OF JERVIS LANGDON, DECEASED, *Appellees*.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

BRIEF IN BEHALF OF APPELLEES.

NOURSE & KAUFFMAN,
WITH WHOM IS
SEYMOUR DEXTER,
of Counsel for Defendants, Appellees.

P. C. KENYON, Legal Printer, Des Moines, Iowa.

IN THE

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APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

BRIEF IN BEHALF OF APPELLEES.

STATEMENT.

The executors of Jervis Langdon, deceased, filed their bill in the circuit court of the United States for the district of Iowa, July 19, 1876, against T. E. Brown and wife, plaintiffs in this appeal, claiming of said T. E. Brown the sum of $25,000, less a credit of $1,289.90, as money due upon certain agreements set forth in the bill of complaint, and also seeking to enforce a lien upon a certain 130 acres of land situated within the corporate limits of the city of Des Moines, Polk county, Iowa. The bill sets out the facts upon which the indebtedness arose, and the stipulation of facts sustains its material allegations, which are as follows: Prior to the decease of Jervis Langdon, Brown was associated with Langdon as a co-partner in a certain business of laying down pavements in

the city of Memphis, Tennessee, and as such co-partners the firm had accumulated large assets. That at the decease of Langdon, which occurred August 6, 1870, plaintiffs were qualified as the executors of his estate, and on the 25th of April, 1871, as such executors, they sold and transferred to Brown all the interest of the deceased in the business and assets of the co-partnership. This sale was for the consideration of $100,000, witnessed by the following assignment:

"In consideration of one hundred thousand dollars this day received of T. E. Brown as by the terms of our contract made with him, bearing date April 25, 1871, we, the executors of the last will of Jervis Langdon, deceased, do hereby sell, assign and transfer to said T. E. Brown all the right, title and interest Jervis Langdon had in his lifetime in and to the property and assets of the firm of T. E. Brown & Co., at Memphis, Tennessee, subject to the terms and conditions of our said contract of April 25, 1871, above mentioned.

(Signed) "J. D. F. SLEE, *Executor.*
"C. J. LANGDON, *Executor.*
"T. W. CRANE, *Executor.*
"SAM'L L. CLEMENS, *Executor.*
"OLIVIA L. LANGDON, *Executrix.*

"Elmira, June 25, 1871."

The manner in which this one hundred thousand dollars was to be paid is witnessed by an agreement dated April 25, 1871, Exhibit No. "1," page 36 of record, and a supplemental agreement Exhibit No. "6," page 39 of the record.

The provisions of the original contract of April 25, 1871, relating to the payment of this $100,000 are as follows: said Brown agrees to pay for such interest as follows:

First. Upon the assignment of the interest above mentioned, twenty-five thousand dollars ($25,000) in cash, together with the further amount of fifty thousand dollars ($50,000) in notes, satisfactorily indorsed by B. F. Allen or other satisfactory indorser, and running from three (3) to eighteen (18) months at a fair average time from these extreme points of time mentioned.

Second. A certain tract of land consisting of one hundred and

thirty (130) acres situated within the limits of the corporation of the city of Des Moines, Iowa, and also a certain plantation situated on White river in Arkansas, consisting of sixteen hundred (1,600) acres of land and all the buildings, improvements and appurtenances belonging thereto. In reference to the lands in Iowa and Arkansas, the purchaser hereby agrees that in five years from the date of this contract he will, if the estate or its legal assigns so desire, purchase back the lands for twenty-five thousand dollars ($25,000), paying that sum in cash.

The supplemental agreement is as follows, pages 39 and 40 of the record :

It is hereby mutually agreed by and between Talmadge E. Brown and J. D. F. Slee and others, executors of the estate of Jervis Langdon, deceased, that said Brown need not perfect his conveyance to the plantation on White river in Arkansas, as he is required to do by contract with said executors dated April 25, 1871, but may in lieu thereof transfer and assign to said executors a certain judgment now owned by him against the county of Buena Vista, state of Iowa, on which there is due to him five thousand dollars ($5,000) for the purposes named in said contract of April 25, 1871, said Brown to guarantee the collection of said judgment.

It is further understood and agreed that if said executors desire it, said Brown shall at the expiration of the five years stated in said contract of April 25, 1871, repurchase the 130 acres of land in the city of Des Moines at $25,000, the same as though the plantation aforesaid was included therein.

And it is further understood that if any of said Buena Vista judgment shall within said five years be paid to said executors they will allow interest thereon at the rate of 7 per cent. per annum, and the principal so paid may be deducted from the $25,000 to be paid by said Brown for the repurchase of the Des Moines property.

In witness whereof said parties have hereunto set their hands this 30th day of August, 1871.

J. D. F. SLEE,

Executor and Attorney for the Executors of the estate of J. Langdon, deceased.

TALMADGE E. BROWN.

The bill charges that on the 12th of July, 1872, complainants received $1,279.90 on the Buena Vista judgment. That the five years in which Brown was to repurchase the land expired on the 25th day of April, 1876, and that on the 25th day of October, 1875, Brown was notified of the desire and election of complainants to take the $25,000 and reconvey the real estate. That Brown in May, 1876, acknowledged receipt of the notice, but asked for an extension of time for the payment of the money. That afterwards in July, 1876, and before the commencement of this suit, plaintiffs tendered a deed to Brown for the reconveyance of the property, and demanded the $25,000 less the credit of $1,279.90 with interest.

The bill prays for a decree for the amount due upon the contract of April 25, 1877, and the contract supplemental thereto, to-wit: $23,381,14 and interest, and for a foreclosure of the equity of Brown and wife in the real estate, and the sale of the same for the satisfaction of the amount due and for general execution for any balance remaining after the sale of the land, and for general relief.

The case was heard upon bill and answer and stipulation of facts, and a decree rendered in accordance with the prayer of the bill.

Defendant Brown, also filed a cross-bill in the cause to which the court sustained a demurrer, and Brown electing not to plead over his cross-bill was dismissed. The appeal also embraces this part of the decree, but we prefer to notice the cross-bill in a distinct and subsequent part of our argument, and shall first dispose of the question made by appellant in circuit court in opposition to the decree

ARGUMENT.

The facts of the case are conceded, and no defense is made except that which is purely technical. We are not advised, with certainty, as to the line of argument that may be pursued in this court, and can only anticipate the objections that may be urged upon appeal, by arguing those that were made on the hearing in the circuit court.

I.

The first objection made to the right of plaintiff to recover in this case is, that they could not maintain this action in the state of Iowa, without first qualifying as executors under the laws of Iowa.

All the authorities cited by appellants on this point, related to the right of executors to sue for the recovery of property of the deceased, or upon contracts made by and with the deceased.

This is a suit brought upon agreements made with the executors as such, and promises and covenants made directly with them.

The suit is not brought to recover in a foreign state, assets of the estate of a deceased person. The thing sued for, is a claim or demand, the legal right and title to which has vested in the executors. The promise or contract of defendant was a promise direct to them. The right and authority of the executors to make this contract with Brown, is conceded in the answer. Brown wants to retain the benefits of his bargain, and answers that the executors had full authority to make the contract sued upon. The question made by his counsel, is only as to the right to bring suit in the state of Iowa without qualifying as executors under the laws of that state.

The counsel for appellant fails to distinguish between a suit based upon a promise and covenant made directly to an executor, and a suit based upon the authority of the executor over

assets of the deceased, derived solely from his letters of administration. This distinction is clearly made and recognized in the case of *Greasons vs. Davis*, 9 Iowa, 224. It is there held that in a suit brought in Iowa upon a judgment rendered in Pennsylvania in favor of the deceased, if the executor had been substituted as plaintiff in the judgment by order of the Pennsylvania court, that the executor might maintain a suit in Iowa upon the judgment without letters of administration in that state.

The principle is elimentary and is fully recognized in Story on Conflict of Laws, Secs. 516, 517 and 518.

II.

The next question discussed in the circuit court relates to the nature and character of the agreement which is the basis of the suit, as to whether or not the land deeded by Brown was deeded as a mere security for a debt, or was an absolute sale with a contract to repurchase.

In the view we take of the case we do not deem this question of vital importance.

That the consideration of the sale and transfer of the interest of Langdon in the co-partnership affairs was $100,000 there can be no question. It is expressly so stipulated in the written assignment. That only $75,000 of the consideration was paid otherwise than by the agreement concerning the land, is equally clear, for it is so expressed in the contract.

That the value of the land within the corporate limits of Des Moines was only estimated at $5,000, clearly appears by Brown's own deed expressing that amount as the consideration of the conveyance. That the Buena Vista county judgment was only $5,000, and was received and assigned in lieu of the Arkansas land named in the original assignment, is also clear.

It seems to be equally clear that the only reason why this $10,000 worth of property was counted for $25,000 in the trade, was the agreement of Brown to buy back the land in

five years for $25,000 less what might be realized on the Buena Vista judgment.

If this $25,000 was absolutely paid by the deed for $5,000 worth of real estate, and the assignment of $5,000 of a judgment against Buena Vista county, how will the court account for the fact that in the supplemental agreement of August 30, 1871, it is expressly stipulated—

"That if any of said Buena Vista judgment shall within five years be paid to said executors, they will allow 7 per cent. interest per annum, and the principal so paid may be deducted from the $25,000 to be paid by Brown for the repurchase of the Des Moines property."

In addition to all of this we have the fact that Brown remained in possession of the real estate, enjoyed the use and occupation rent free, and assumed the burden of paying the taxes thereon. It is true this was accomplished by means of a lease nominally of the premises, but all of the papers were mere forms. The substance of the agreement was that the land was security for the debt, with the right of plaintiffs to elect either to take the land or the money.

And this brings us to the main question in the case.

III.

As to the rights, duties and obligations of the parties with reference to the election on the part of the executors. In order to get this question clearly before the court, we quote in full the provisions of the original contract of April 25, 1871, and of the supplemental agreement of August 30, 1871, relating to the "repurchase:"

"Upon the assignment of the interest above mentioned, $25,000.00 in cash, together with the further amount of $50,0000.00 in notes satisfactorily endorsed by B. F. Allen, or other satisfactory endorser, &c. * * * A certain tract of land consisting of 130 acres, situated within the limits of the corporation of the city of Des Moines, Iowa; and also a certain plantation situated on White river, in Arkansas, consisting of 1,600 acres. * * *

"In reference to the land in Iowa and Arkansas, the purchaser hereby agrees that in five years from the date of this contract he will, if the estate or its legal assigns so desire, purchase back the lands for $25,000.00, paying that sum in cash."

The supplemental agreement reads as follows:

"It is further understood and agreed, that if said executors desire it, the said Brown shall, at the expiration of the five years stated in said contract of April 25, 1871, repurchase the 130 acres of land in the city of Des Moines, Iowa, at $25,000.00, the same as though the plantation aforesaid was included therein; and it is further understood that if any of said Buena Vista judgment shall, within said five years, be paid to said executors, they will allow interest thereon at the rate of 7 per cent. per annum, and the principal so paid may be deducted from the $25,000.00 to be paid by said Brown for the repurchase of the Des Moines property."

The election of the executors and notification of the same to Brown is evidenced by the following letter dated five months and twenty-five days before the expiration of the five years:

"ELMIRA, Oct. 30, '75.

"T. E. BROWN, ESQ., Des Moines, Iowa:

"DEAR SIR: My wife's health is so poor that I am obliged to go away with her, and shall sail for Europe Saturday next, for an absence of four, six or eight months. I have left all necessary papers for the closing of our matters, the redeeding of the Des Moines land, and all other necessary business, with Mr. Slee. The balance of $25,000, less what has been paid on Buena Vista county judgment, will be due April 25, '76 and we shall desire the money at that time as per contract.

"Yours truly,

"C. J. LANGDON, *Executor*."

To which communication Mr. Brown replied as follows:

"DES MOINES, 26 May, '76.

"CHAS. J. LANGDON, ESQ., Elmira, N. Y.:

"DEAR SIR: Your letter to me last fall in regard to the land here did not seem to require an early answer, and I have delayed it until now. I shall not be able to pay you the money this year, and propose the following, which I trust will answer your purpose: 25th April, '77, $5,000; and a like sum on the 25th of each April following, all unpaid sums to draw 6 per cent. per annum from April 25, '76. The land to remain in your name as it is until all is paid. The last payment would be fractional part of $5,000 of course. This is small interest, but interest must in future be less than it has been, and this is all I get on money that has been due longer than this has to you. There has been nothing paid on the Buena Vista judgment since my remittance to you. The county are trying to have the same set aside for some informality or fraud and may succeed, but I think not.

"Very truly yours, &c.,

"T. E. BROWN."

Our first proposition of law is:

That in order to make this contract an absolute obligation on the part of Brown to repurchase the land and pay $25,000 therefor, all that was necessary was that the executors, at any time prior to the expiration of the five years, should notify Brown, in the language of the contract, "that they desired him to repurchase," and that thereupon his obligation to pay the $25,000 became absolute.

It will be observed that the only condition necessary to make this an absolute agreement, on the part of Brown to repurchase, is the *desire* of the executors, or of their legal assignee, that he should make the repurchase. The notification to Brown of this desire on their part, does not require that he should accept of their notification as a proposition made to him. His acceptance is already contracted for and agreed to by him in the original agreement. The original agreement is, upon the part of Brown, a continuing proposition which the executors may accept at any time within five years; and upon their acceptance and notification to him the contract becomes an absolute contract of sale. Time is not of the essence of the contract of sale, after the contract becomes absolute by this notification. If time is essential at all it is simply essential as it relates to the duty of the executors to make their election in the five years, and to notify Brown of the fact.

The authorities upon this point we think are conclusive.

The case of *Corson vs. Mulvaney*, 49 Penn. State R., 88, was an agreement upon the part of Corson to convey certain mining property to Mulvaney upon condition, that if the said Mulvaney shall desire to purchase the said tract of land at any time prior to the first of April, 1864, &c.

On the 28th of March, 1864, Mulvaney notified Corson in writing that he had made up his mind to take the property at the time, and for the price mentioned.

In commenting upon this case, counsel for appellant have sought to avoid the force of the court's reasoning and application of law, by the assertion that in this case the purchase-

money and mortgage were tendered in strict accordance with the contract. But this fact does not figure in the case. The question the court argues is, whether there was a completed contract by the election of the party and one mutually binding.

The opinion of the court (page 99) in regard to this point is as follows:

"The agreement is mutual. One says 'I will sell if you conclude to purchase.' The other says 'I will pay if I conclude to purchase.' He then resolves, and says 'I have concluded.' The contingency upon which performance was rested has happened; why are not both bound? One would think it a plain case of mutual obligation of performance on the happening of the event which was fixed as the condition of performance."

In speaking of the tender, the court says:

"The offer or tender is *not itself* the election; it is but the consequence of it. It is said, if the seller refuse to accept the tender, the purchaser may retract. He is not bound, and of course the remedy is not mutual. But the falacy lies in this: He is not bound, not because no obligation of performance exists in his election, but because he sets up the seller's breach of contract by refusal as a *discharge of the obligation*. The obligation was there, and because the seller chose not to recognize it the purchaser now chooses to be discharged from it. Take a better test. The purchaser writes to the seller: 'I have concluded to take your property according to our contract. I will have a deed prepared for your execution and mortgage according to the terms, and *will meet you to perform our bargain*.' *Will it be said that, after this explicit notice of his election, the purchaser can fly from his contract, without the refusal of the seller to accept performance?* Then how can the seller avail himself of his own refusal as an excuse for non-performance? * * * The error into which the opposite argument runs is in supposing that election is the initiation of a new contract, instead of the stipulation on which performance of an old one rests. It is the idea of a proposition which may be retracted before acceptance, and no contract arises, forgetting that here there is a contract for election, which prevents a refusal to accept. Therefore it is said there can be no obligation without the consent of the other. This loses sight of two facts. First, that a previous assent has been given; and second, that the party notified of the election has no right to dissent. The party is already bound to accept performance when the election has been made, and when made his previous assent attaches. He may refuse, it is true, but it is not to decline a proposition, but to refuse performance of a bargain. If it were the initiation of a new contract, as if one should voluntarily offer me his bond, he would not become my debtor until I

accepted it. I am under no obligation to receive his bond, but if I had previously bound myself to receive his bond, in performance of a stipulation already agreed upon, I would find it difficult to refuse it."

The court, in the same case, page 100, cites the case of *Kerr vs. Day*, 2 Harris, 112, which was an agreement for a lease with the privilege of the purchase of the premises at any time within three years. The assignee of the lessee gave notice of his election to purchase. BELL, Judge, delivered the opinion of the court. *Held:* That the title vested upon notice of the election in equity, and operated as a conversion of the lessor's estate into personalty. That the election of the assignee was good against the alienee of the lessor, and he became liable to specific performance.

And so in the case of Smith and Fleck's appeal, 69 Penn. St. R., 474.

Smith agreed to sell to Rayduer certain land; Rayduer to have the refusal ten days from date. Rayduer gave verbal notice that he would take the land. It was held:

"That time was of the essence of the contract, as *relating to the option, but not as to the performance.* That the contract was not within the statute of frauds, and specific performance could be enforced."

The court say:

"It is evident that time was not intended to be of the essence of the contract as respected performance. It is only material as respecting the option given for its refusal, and therefore the plaintiffs were not bound to perform or offer to perform within ten days."

Nor was tender of performance absolutely essential to the maintainance of the bill for a specific execution of the agreement by the defendants. It would be sufficient to aver the plaintiff's willingness and readiness to perform. (See opinion, page 481.)

The case of *Moote vs. Criven* (33 Mich. R., 500), was an agreement to resell certain lands that had been acquired by Scrivener under a foreclosure proceeding. The answer admitted a bargain to resell on one year's time. The evidence failed to sustain any definite contract for the resale of the

property. The court say (p. 503), "An agreement to sell is more in accordance with all the facts than a mortgage."

The court held that time was not of the essence of the contract, and that Moote might have a decree for a specific performance.

The case of *Mattison vs. Scofield* (28 Wis., 671), defendant offered, by letter, to sell certain land for $3,200.00, one thousand down and five hundred annually with interest until the whole was paid, the amount unpaid to be secured by mortgage. Plaintiff wrote a letter accepting the proposition and appointing a certain time and place to close up the transaction, which time and place were not agreed to by the defendant. Held by the court: "That the terms of acceptance were absolute as to the price and the terms of payment, and that time was not of the essence of the contract or of its performance."

So in a case cited by defendants, of *Austin vs. Tawney*, 2 Law Rep., Ch. A, p. 143, the same principle is recognized. In that case the testator by will directed that his oldest son should have the option of purchasing certain lands at a price to be fixed by arbitrators, and that he should have two months within which he should enter into an agreement for the completion of the purchase. The arbitrators made an award on the 5th of May. On the 17th of the same month a solicitor wrote to the son, giving him notice of the award. On the 16th of June the son replied to the solicitor accepting the terms of purchase provided for in the award, but no formal agreement was made until the 6th day of July following. It was held: "First, that the two months should be computed from the time of notice of the award." But it was held further: "That if the formal agreement had not been entered into within the two months, yet the letter of June 16th accepting the terms of the award, constituted a sufficient and binding agreement under the will, and that the party was entitled to enforce the purchase."

These authorities would seem to settle the question that *after* the election by the exectors within the time specified in the contract, the agreement became mutually binding, and that the performance of the agreement, like that of any ordinary contract for the sale of real estate, may be enforced by either party within a reasonable length of time after the day mentioned in the agreement.

A contract for the sale of land, although executory in form, is regarded in equity as executed, and passes the equitable estate to the vendee, except in those cases when the actual payment of the purchase money, or the performance of some other act, is made a condition precedent to the sale. But when the payment of the purchase money is not a condition precedent to the sale, and the mutual covenants of the parties (that is, the promise to pay and the promise to convey) stand as a consideration one for the other, both mutually binding, time is never regarded in equity as of the essence of the contract.

Barned vs. Lee, 97 Mass., 93.
Kerr vs. Day, 14 Penn. State., 114.
Townley vs. Bidwell, 14 Vesey, 591.
Daniels vs. Davidson, 16 Vesey, 253.
Siter James & Co.'s Appeal, 26 Penn. State., 178.
Sutter's Heirs vs. Ting, 25 Penn. State., 466.

The case at bar is even stronger than this, for here *no time is fixed for the reconveyance of the land.* The time is fixed for the payment of the $25,000, but the duty to reconvey is not provided for by any express stipulation, but is one that results from, and can only arise after the payment of the purchase money by Brown.

In the case of *Wilks vs. Smith*, 10 Mason & Welbys, 355, plaintiff agreed to sell certain real estate to defendant for the consideration of 120 pounds to be paid on or before the expiration of four years, with half yearly interest from date. The suit was to recover interest at the expiration of two years. Upon demurrer, because no conveyance had been tendered and

no averment of willingness nor ability to perform, the court held that—

"According to the terms of the agreement no time was fixed for the conveyance, but that a time was limited within which the purchase money was to be paid, with interest in the mean time."

The court says:

"The plaintiff is not bound to do anything before the money is paid, no time being fixed by the agreement for the conveyance of the land, it cannot be a condition precedent to his right to recover the purchase money."

So in the case of *Perago vs. Cole*, 1 Saunders R., 319, upon a similar covenant it was held that the day for payment was fixed, but not the time for a conveyance.

See also the case of *Northrup vs. Northrup*, 6 Cowen, 296.

The Supreme Court of Iowa has decided this very question, and as the contract relates to land in that state, we presume that ruling is conclusive as to the rights of the parties.

In the case of *Rutherford vs. Haven & Co.*, 11 Iowa, 588, it is held that a vendor of real estate under a contract containing *mutual* and *dependent* covenants, is not required to tender a deed to the vendee before filing his bill in equity to enforce performance against the vendee.

This case is cited and followed by the court, and the exact question again decided in *Winton vs. Sherman*, 20 Iowa, 296, opinion by COLE, J.

The rule is different in an action at law for the purchase-money.

Muray School Dist. vs. Rogers, 8 Iowa, 318.
Berryhill vs. Byington, 10 Iowa, 223.
Collins vs. Vandever, Admr., 1 Iowa, 573.

We notice briefly the cases chiefly relied on by appellants in the court below, none of which we think decide anything contrary to the foregoing views.

In the case of *Magoffin vs. Holt*, 1 Duvall Ky., 95, there was no election and no notice within the three years. In that case the election, by the express terms of the contract, was

to have been made at the expiration of the three years from its date.

The case of *Barrel vs. Sabine*, 1 Vernon, 268, was a case in which the plaintiff had entered into a contract to repurchase certain property, with a distinct covenant that he would repay the purchase money and one hundred pounds *within* one year. Here it was held that payment within the time was a condition precedent of his purchase, and of his right to compel a conveyance.

So in the case of *Lord Raleigh vs. Melton*, 10 Jur., N. S., 1141, the contract was that the plaintiff should have the privilege of purchasing within a given time by giving three month's notice of his desire to do so, and paying a certain amount at the expiration of the time fixed in the notice. It was held that the contract required payment within the time, and that time was of the essence of the agreement.

So in the case of *Galt vs. Jackson*, 9 Ga., 151, the express covenant was that payment should be made within a given time as a condition of the repurchase.

So in the case of *Slowry vs. McMurray*, 27 Mo., 113. This was a sale of property on execution with a contract that the defendant might redeem by repayment of the money within one year. Held, that time was of the essence of the contract; and that a failure to pay within the time, forfeited the right.

In the case of *Beck vs. Blue*, 42 Ala., 32, no time was fixed for the repurchase of the property. Held, that a failure to exercise the right in ten years, and a further failure of twelve months after appointment of executor, was such laches as forfeited the right to a specific performance.

The case of *Weston vs. Collins*, 11 Jurist, N. S., 190, was also a case in which payment was, by the express terms of the contract, made a condition precedent of any obligation on the part of defendant to convey.

The court will observe that none of these cases have any application to the question now before the court. Here it is not a question as to the right of the purchaser, who has failed

to comply with his contract within the time given him by contract for a repurchase. The covenant in this contract is that Brown will repurchase in a given time, if the estate or its assignee desire him to do so. Notice having been given to Brown, it is *his duty* to proceed with his repurchase. Before the executors need tender him a conveyance he must tender the money, for the payment of the money is a condition precedent to his right to a conveyance.

As we have already said, there is no express covenant to convey at all. No time is fixed for a conveyance, and as no duty arises until *after* payment, the time for a conveyance must be held subsequent to the time of payment. (See authorities before cited on this point.)

IV.

It is next insisted that notice of the election by the executors requiring the money came too soon; that it must be made on the very day the five years expire.

Our first answer to this proposition is, that "it is not so nominated in the bond." The language of the contract is that Brown is to purchase in five years if the executors so desire, but when this desire or election on the part of the executors is to be made, or how it is to be communicated to Brown, if at all, is left to construction.

By necessary implication the election must be before the time Brown is required to purchase, and the law would give him the right to a reasonable notice of the election before he would be required to pay so large a sum of money.

The purchase is a large one. The money is to be paid all at once. A fair construction of the contract would be that Brown must have a reasonable notice before the expiration of the time.

The next conclusive answer to this proposition is, that if the contract had required ten days' notice of this election prior to the expiration of the five years, that twenty days' notice would have been good. The greater includes the less.

Another answer is that the object of this notice is simply to express and make known to Brown the desire of the executors. The information once conveyed to him is a continuing notice. The information once lodged in his mind is there from day to day, and is there on the day upon which he is required to make payment.

It is said the executors might, in the interim, have changed their minds and gave a notice rescinding their first election. It is a sufficient answer to this to say that not having done so the first notice and election stood as their choice at the expiration of the five years.

It is not necessary to discuss a question not in the case, though there can be but little doubt that an election once made, and notice given to defendant, was final and conclusive, and fixed the rights of both parties.

V.

Our next proposition is that the notice given was received and accepted by Brown as sufficient, and he recognized his liability under it. In the first place he made no objection to the sufficiency of it at the time it was given, and secondly, by his letter of 26th May, 1876, he accepts the notice and admits his liability under it. This letter is a waiver not only of all objection as to the time of notice of election, but is also a waiver of any and all objection that a deed was not tendered him at the exact expiration of five years. The letter reads as follows:

"DES MOINES, 26 May, '76.

"CHAS. J. LANGDON, ESQ., Elmira, N. Y.:

"DEAR SIR: Your letter to me last fall in regard to the land here did not seem to require an early answer, and I have delayed it until now. I shall not be able to pay you the money this year, and propose the following which I trust will answer your purpose: 25th April, '77, $5,000; and a like sum on the 25th of each April following; all unpaid sums to draw six per cent. per annum from April 25, '76. The land to remain in your name as it is until all is paid. The last payment would be fractional part of $5,000 of course. This is small interest, but interest must in future be less than it has been, and this

is all I get on money that has been due longer than this has to you. There has been nothing paid on the Buena Vista judgment since my remittance to you. The county are trying to have the same set aside for some informality or fraud and may succeed, but I think not.

"Very truly yours, &c.,

"T. E. BROWN."

We call the attention of the court to the fact that Brown did not answer the letter of October 30, 1875, until May 26, 1876, first, because he says *that time is immaterial.* Such is a fair construction to be placed upon his language "that the letter of October 30, 1875, did not require an early answer." Second, Brown says, in his letter of May 26, 1876, that he is "not able to pay the money this year," showing that a tender of a deed to him at any earlier date was wholly immaterial, and did not effect any substantial right. Third, Brown says that he desires to make payments annually of five thousand dollars, commencing on the 25th day of April following, the land to remain *as it is*, in the name of Langdon, until the money is paid. He further says, referring to the rate of interest—6 per cent.—that he proposes to pay: "This is all I get on money that has been due longer *than this has to you.*" He here recognizes the fact that this indebtedness of $25,000.00 has been absolutely fixed, by what had preceded the writing of this letter. He calls it an obligation or debt due to the executors, and recognizes the fact that Langdon was then holding the land in trust and as security for that debt.

The idea that this is a new proposition upon the part of Brown to repurchase the land, is an invention. When he says, "I shall not be able to pay you the money this year," Brown refers to the money that Langdon notified him, on the 30th of October, 1875, would be due on the 25th of April, 1876, and which they would desire at that time. Brown nowhere in this letter intimates that he is discharged from the obligation to pay this $25,000.00, by any laches or neglect upon the part of the executors.

We call the attention of the court to the following anthorities:

The case of *Webb vs. Hughes*, Law Rep., 10 Eq., 281. It is held that a continuation of a negotiation after the day, even where time is of the essence of the contract, is a waiver of the time.

In the case of *Meginnis vs. Fallow*, 2 Malloy, 578, it is held that where time is of the essence of the contract, if the party does not make his stand at once, but goes on contesting the title, he loses the opportunity of insisting on the advantage of the delay.

So in the case of *Hepwell vs. Knight*, Young & Collyers Rep. of Exch., Vol. I, 416, we have the same doctrine.

In *King vs. Wilson*, 6 Bevan, 124, it was held that "though time was not of the essence of the contract, it might be made so by notice when there has been great delay, but though time is thus made material it is waived if the purchaser proceed with the negotiation, after the time mentioned in the notice.

And in *Hunter vs. Slade*, 7 Vesey, 265, it is held that receiving an abstract *after* the expiration of the day fixed for performance is a waiver of time and specific performance was decreed.

Even in the strictness of commercial law, requiring notice to endorsers of the non-payment or dishonor of a bill, it has been held that any admission upon the part of the endorser of his liability, with the full knowledge that notice had not been given him, is a waiver. See *Thornton vs. Wynn*, 12 Wheaton, 188, in which the court cites the case in which the endorser said that his affairs were then deranged, but that he would be glad to pay it as soon as the accounts with his agents were settled. Held, to be a waiver of notice. The Supreme Court of the United States, in this case, say that the principle upon which the decisions proceed, is explained in the case of *Rogers vs. Stevens*, 2 Term Rep., 713. It is this: That such declarations and acts amount to an admission of the party

that the holder has a right to resort to him on the bill, and and that *he had received no damage from want of notice.* The court also cite the case of *Leffingwell and Pierpont vs. White*, 1 Johnson's Cases, 99, in which it is said that the defendant had admitted the responsibility, treated the note as his own, and *negotiated for further time for payment*, by which conduct he had waived the necessity of demand by the maker and notice to himself.

It will be observed that in these cases no principle of estoppel is relied on. On the contrary, the waiver is after the failure to give notice, and after the right to a discharge is complete.

It simply rests on the principle that if time of notice is important, it is for the benefit of the party who is the best judge of any prejudice to him of a failure to give him such a notice.

The time of the performance of a contract is essential, or not, according to the circumstances of the case and the manifest intention of the parties. In this case it is not pretended that any change has taken place in the value of the property or of the circumstance of the parties.

It might have made Brown "uncomfortable before his time" to notify him before the expiration of the five years but it could not have worked any legal prejudice. He says it didn't matter as he hadn't the money anyhow.

VI.

The next objection made in the circuit court was that the notice came only from one of the executors and did not bind the others. To this it is a sufficient answer to say that it was made in behalf of all of them, and is so expressed in the letter; and that the defendant in this cause, in response to the election so made, recognized that it had been made in behalf of all, and made no objection to the notification on that account.

Besides the contract provided that the election should be made by the legal assignee of the estate, and the stipulation shows that by the consent of the parties, the person who gave the notice or wrote the letter, to-wit: C. J. Langdon, executor, had been vested with the legal title to this property, and was the trustee of the executors, acting in their behalf, and clothed with express authority to make this election, by the very contract and agreement of the parties. The language of the contract is, that the resale should be at the desire of the estate or its assignee.

This refers to the person to whom, by the agreement of the parties, this land was assigned, and in whom the legal title was vested in trust for the executors.

This real estate was assets in the hands of the executors, and in law is to be regarded as personalty, and the act of one executor is the act of all.

See—

Bogert vs. Hertell, 4 Hill, 492.

Reversing same case reported in 9 Paige, Ch. 51.

Also—

Murray vs. Blatchford, 1 Wend., 583.
Wheeler vs. Wheeler, 9 Cowen, 34.
3 Redfield on Wills, 222.

This disposes of the questions made upon the plaintiff's case, and leaves only for consideration the questions arising upon the demurrer to

VII.

Defendant's Cross-Bill.

The cross-bill alleges that Brown and Langdon entered into a co-partnership in 1867, for the purpose of completing certain paving contracts, and adopted the firm name of T. E. Brown & Co. That by virtue of the co-partnership agreement Langdon was to furnish all the needful capital in the business. That on the 6th day of April, 1868, the firm was

indebted to one Baldwin in the sum of about $25,000, and that Langdon transmitted to the firm of T. E. Brown & Co., certain accounts against Baldwin, with the request that the same be charged against Baldwin on the firm books and credited to Langdon, on account. "Said Langdon then and there "promising and agreeing with Brown & Co. that Baldwin "should deliver at Memphis, sufficient lumber suitable for "their paving contracts, to make good Baldwin's account."

These accounts are set forth as exhibits to the cross-bill. No written assignment or guaranty of them is set out or averred. It is further alleged that said charges and credits were asked for by Langdon upon the ground that it would enable him, Langdon, to collect his claims against Baldwin.

The cross-bill then avers a balance of $43,800, due from Baldwin to the firm of T. E. Brown & Co. on these accounts, and sets out the purchase by Brown of the interest of the estate of Langdon in and to the firm assets, and *by virtue of this purchase* claims that Brown is the owner of the amount due from Baldwin, *and of the alleged guaranty by Langdon of the Baldwin accounts.* There is no averment that any attempt was ever made to collect these accounts of Baldwin, or that Baldwin was insolvent.

The cross-bill then sets up the contract by which the matters between the estate and Brown were settled and the executors released to Brown all interest in the assets.

This contract is found on page 36 of the record, as Exhibit 1 to the cross-bill, and is as follows:

"The executors of Jervis Langdon, deceased for value received, hereby sell, assign, set over and transfer unto Talmadge E. Brown, all the right, title and interest of J. Langdon, deceased, in or to the undivided property or assets of the late firm of T. E. Brown & Co., of Memphis, Tennessee.

"Subject, however, to all taxes and assessments thereon now made or hereafter to be made, to all indebtedness therefor, and to all liabilities of said firm, or any of the members thereof, for transactions in the business of the firm, in tort and contract, and subject to all judgments against the said firm, or any member thereof, recovered or to be recovered, and all costs, disbursements, officers and counsel fees, and all liability for contribution to any other partner

or person in consideration of moneys paid, or to be paid, upon any liability of, from and against all of which real or possible liabilities, and of, from and against any other liability growing out of the transactions of said firm, said Brown agrees to fully indemnify and save harmless, the executors, heirs and next of kin of said J. Langdon, deceased.

"And said Brown further agrees to pay and discharge any just and legal claim of any person or persons whomsoever, for any share of the profits or proceeds of the business of said firm, whether said claim be against the said firm or against the said Langdon, deceased, individually, and to fully indemnify and save harmless, the executors, heirs and next of kin, of said Langdon, of, from and against any such claim, all the aforesaid agreements of indemnity to apply not only to the liability growing out of the transactions of said firm, but also to any possible liability growing out of the transactions of the predecessors of said firm."

The above assignment, with its conditions and contract of indemnity, upon the part of Brown, would seem to be clear, full and explicit, and its terms and its spirit seems to exclude the possibility of Brown having any recourse against the estate by reason of any matters growing out of this co-partnership. In the first place the executors contract only for a release to Brown of whatever interest they had in the assets of the firm. It is very clear that they intended by this assignment or release, that Brown should take these assets for better or worse, and without any guaranty of them.

The executors had no personal knowledge and could have had none of the value or condition of these assets except as they derived it from the statements of Brown, or by examination of the books of the concern.

The claim set up in this cross-bill is that the executors intended to and did assign to Brown the legal title of T. E. Brown & Co. to this Baldwin account, and at the same time by virtue of that assignment, transferred to him a certain verbal contract of guaranty, of which they have no knowledge, but which Langdon, deceased, had made to T. E. Brown & Co. concerning this Baldwin account.

Upon its face this is a most unconscionable proposition, and finds no support either in the letter or the spirit of the contract between the executors and Brown.

The cross-bill does not aver that at the time this contract was made the executors had any knowledge or information that any such verbal contract of guaranty had been made by Langdon, deceased, or that Brown intimated to them in any form the existence of such a guaranty.

It is assumed in the cross-bill, *as a matter of law*, that this release or assignment exhibit, no one was, in form, a transfer to T. E. Brown of the legal title of T. E. Brown & Co. to the Baldwin account and also operated as a transfer of T. E. Brown & Co.'s right and interest in a verbal contract of guaranty relating to said account made theretofore, by Langdon, deceased, to the firm of T. E. Brown & Co.

Neither of these propositions can be maintained.

In the first place the contract is not a sale and transfer of the legal title of T. E. Brown & Co. to the Baldwin account. It is not that, either in form or in spirit. On the contrary the contract is simply a release of the INTEREST of Langdon, deceased, in and to the partnership assets.

Now, what was that interest? In other words, what right or claim had the executors to the assets of T. E. Brown & Co.?

We answer, it was their share of the assets or the balance of account, that might stand in their favor, after the affairs of the co-partnership were all settled — only this, and nothing more.

Upon the books of the firm, it is claimed, stood an account against Baldwin for $43,800, which amount had been also credited, on the books of the firm, to the account of Langdon, deceased, and that these credits were so entered upon his verbal agreement, that this account should be made good. Now, if this is true, how must the partnership be settled and what is *the interest* of Langdon, deceased, in the undivided assets of the firm of T. E. Brown & Co. Clearly, this interest can only be ascertained and a balance struck between the partners by charging back the unpaid balance of the Baldwin account against Langdon, deceased, and the interest of Langdon, de-

ceased, was simply his share of these assets, after deducting the amount of this Baldwin account as well as all other sums for which he was properly chargeable. And *this* balance thus left was what was released to Brown by the executors. Brown says to the executors, in substance and effect, that whatever the balance might be that you could claim of me, as surviving partner, after a full and final settlement of all the affairs of this co-partnership, I desire you to release and for that release I will pay one hundred thousand dollars. And the executors say, we will take it.

We say, secondly, that such a release could in no event be construed into an assignment to Brown of a verbal agreement or warranty of the Baldwin account.

A release or assignment by the executors of *their interest* in the *personal liability* of the testator to T. E. Brown & Co. would be a strange contract.

If the liability had been in the farm of a bond or note, executed by the deceased to T. E. Brown & Co., it might have been sold and assigned by T. E. Brown & Co., or by any one authorized to sell the same, to a third person, and the legal title would have passed and the estate been held.

But such is not this contract. The cross-bill does not claim that the guaranty of the Baldwin account was ever mentioned in the negotiation, or that the executors had any knowledge of its existence.

Whatever interest they, as executors, had in the Baldwin account, they released — if none, they sold none. If the account was worthless and in pursuance of the agreement upon which it was credited to Langdon, it should be charged up to him; then their interest in the assets were so much less and they released so much less to Brown. This theory of a transfer of the legal title of Brown & Co. to T. E. Brown, of the Baldwin account, and as incident to it, a transfer of a verbal guaranty, is very ingenious, but the language of the contract is fatal to it. The contract, exhibit one to the cross-bill, contains

an express release by Brown of any such guaranty, if it existed.

It is provided that —

"This assignment is subject to all liabilities of any member of the firm, in contract, or in tort."

Now, these words, if they have any meaning, necessarily embrace the supposed verbal contract of Langdon, who was a member of the firm. The Baldwin account was a transaction in the business of the firm and the guaranty was in contract.

Let us see what are the facts as averred in the bill in regard to this Baldwin account. The bill charges that it became the property of the firm by the act of crediting Baldwin with it on the books of the firm, and that the firm allowed Langdon to draw out certain cash assets in lieu thereof, and that this was done in consideration of Langdon's guaranty; also, that Baldwin was at that time a member of the firm and stood credited on the books with $25,000 of capital advanced, which is paid by this account.

In the amendment to the bill (page 45 of the record) it is charged that the guaranty of said account, by Langdon, was an individual transaction and had no connection with the business of the firm or with the transactions of the firm. That the transfer of the account was not in any manner an advancement by Langdon of capital to the firm, because that he had furnished all the capital before; that shortly after the credit given him of the aforesaid account, he withdrew from the firm on account thereof the entire face of the credit so guaranteed.

Now these averments do not change the legal effect of the statement — it is still a guaranty of Langdon to the firm of Brown & Co. of an account which became the property of Brown & Co. by virtue of a transfer of the same from Langdon to the firm of Brown & Co., for which Brown & Co paid a valuable consideration in permitting Langdon to withdraw assets from the firm. The transaction, therefore, as alleged

by complainant's bill is a firm transaction and is within the very letter of the contract of April 25, 1871, which excepts from the operation of the assignment all liability of any member of the firm for the transactions in the business of the firm —that is to say, if Langdon in any of his transactions with the firm had become individually liable to it, upon any account whatever, he was released from that liability in this contract of assignment.

The amendment to the cross-bill recites:

"That at the time of the purchase of the interest of said Langdon's estate from his executors, it was believed, at all events there was a hope and probability, that something at least upon the balance due on Baldwin's account, and possibly all, might be collected or in some manner realized from Baldwin. The said claim against said Baldwin was spoken of and was the subject of conversation between the parties at the time of the purchase, and the same was not settled or adjusted or understood to be embraced in the terms of the settlement, for the reason, among others, of the hope that the same might be realized in whole or in part from the said Baldwin. Your orator therefore distinctly avers as a substantive and existing fact, that the claim upon Langdon's executors by reason of that guaranty was not embraced in said settlement nor intended to be embraced, but was omitted therefrom for adjustment between the parties in case Baldwin should fail to pay the balance against him."

The language used here in this cross-bill needs close attention. It is carefully worded to seem to mean what it carefully avoids saying. Let us see what facts are alleged: First, it is asserted that the claim against Baldwin was spoken of, and was made the subject of conversation between the parties. Second, it is asserted that this claim against Baldwin was not settled or adjusted or understood to be embraced in the terms of the settlement for the reason that a hope existed that something might be realized from Baldwin. It is not here asserted that anything was said about any guaranty of this claim of Baldwin's by the deceased. It is not averred that anything was intimated by Brown to the executors, that the estate was liable on any such guaranty. Neither is it asserted that the claim upon such guaranty was by the agreement of the parties left out or omitted, but it is merely asserted that the

Baldwin account was spoken of as a claim against Baldwin. That it was estimated to be worth something and that the claim against Baldwin was not settled or adjusted at that time.

Now the conclusion of the pleader as set forth in the words:

"That your orator *therefore* distinctly avers that the claim upon Langdon's executors was not intended to be embraced in the settlement,"

is simply a deduction by the pleader from the facts before stated. But if the "therefore" is not justified or sustained by the previous allegations, its illogical conclusions cannot help the pleading.

The question as to whether or not this claim was embraced in that settlement must depend upon the *facts* averred in the cross-bill and the language of the contract made between the parties. It is very clear that a mere mention of the existence of this account, or the mere mention of the fact that a portion of it might be collected, did not exclude it from the operation of that release. On the contrary the whole of this cross-bill is based upon the claim that this account against Baldwin was assigned to Brown, and it is by that very release that he now seeks to maintain his cross-bill. When, therefore, he avers that this account was not understood to be embraced in the terms of that settlement made between the executors and Brown, he overstates his case, for if that is true then the Baldwin account was not assigned at all, and Brown has no right of action upon any supposed guaranty made to the firm of Brown & Company. But this is not really the position of the appellant, for he does mean to assert that the Baldwin account was embraced in this contract of settlement, and by its terms that the executors relinquished to Brown all their right, title, and interest in that as well as the other assets of the firm of Brown & Co. But if the Baldwin account was embraced in the release or assignment to Brown, so also Langdon's supposed guaranty of the Baldwin account was embraced in the words of limitation providing that no liability of Langdon to Brown & Co. should be assigned, but that it should be and was released.

VIII.

Our last proposition in regard to the claim asserted in the cross-bill is, that it is an attempt to sue the executors in a foreign jurisdiction upon a liability or debt due from the testator. It is conceded that the defendants in the cross-bill are not executors, appointed or existing within the jurisdiction of the circuit court of Iowa.

In the case of *Vaughn vs. Northup*, 15 Peters, 1, this court holds that—

"Every grant of administration is strictly confined in its authority and operation to the limits of the territory or government which grants it, and does not extend *de jure* to other countries. * * * * * The administrator is bound to account for all the assets which he receives under and in virtue of his administration to the proper tribunals of the government from which he derives his authority, and the tribunals of other states have no right to interfere with or control the application of those assets, according to the *lex loci*. Hence, it becomes an established doctrine, that an administrator, appointed in one state, cannot, in his official capacity, sue for any debts due *to his intestate* in the courts of another state, and that he is not liable to be sued in that capacity in the courts of the latter, by any creditor, for any debts due them *by his intestate*."

Supra, 15 Peters, pp. 5 & 6.

There can be no question that this cross-bill is based wholly upon the claim of a debt due by the testator upon a contract made *by him*.

If the contract upon which the executor brought this suit was also a contract made *by the testator* with Brown, there is no question that they could not maintain this suit against Brown and wife in the courts of Iowa without qualifying as executors under the laws of that state. But their suit is based on a contract made by the executors with Brown and upon a covenant made to them. The assets of T. E. Brown & Co. were so far reduced to possession by these executors in the state of New York that with the approval of the court there they sold and delivered them to Brown. The contract is dated at Elmira, N. Y., June 25, 1871.

For the enforcement of the promise made to them they may maintain their suit in any jurisdiction.

Not so the claim set up by Brown against the executors. He claims upon a guaranty of an account made by the testator in his life time, to Brown & Co., and upon that claim seeks to maintain a suit in a foreign jurisdiction. Clearly for this cause, also, the demurrer was properly sustained, and the cross-bill properly dismissed.

We ask that the decree of the court below, both as to the decree granting relief on the original bill and the decree dismissing the cross-bill, be affirmed.

NOURSE & KAUFFMAN,
WITH WHOM IS
SEYMOUR DEXTER,
of Counsel for Defendants, Appellees.

IN THE

Supreme Court of the United States.

TALMADGE E. BROWN AND WIFE, APPELLANTS, *vs.* JOHN D. F. SLEE ET AL., APPELLEES.	No. 269.

Brief of Appellees in Response.

Upon the point that it was not the duty of plaintiffs to make an election upon the very day of the expiration of five years, in addition to the authorities before cited, see—

Reese vs. Beck, 24 Ala., 651.
McLeod vs. Smith, 12 Ala., 9.

Though time is made or becomes of the essence of the contract, yet such provisions are for the benefit of the vendor and secure prompt payment, and the vendee cannot take any advantage of his own default.

Canfield vs. Westcott, 5 Cowen, 270.
Clark vs. Jones, 1 Denio, 517.
Mason vs. Caldwell, 5 Gilman, 204.
Winton vs. Sherman, 20 Iowa, 296.

It is the duty of the vendee to tender payment, and to prepare and offer for execution a deed, or at least to demand a deed, and the vendor is not in default until a reasonable time has elapsed after demand.

Connelly vs. Pierce, 7 Wend., 132.
Fuller vs. Hubbard, 6 Cowen, 17.
Hackett vs. Huson & Youngs, 3 Wend., 250.

Nearly all the authorities cited in appellants' brief relate to the duty of the vendee to make prompt payment where prompt payment is required by the terms of the contract. The duty of the vendor to tender a deed on that day is *assumed*. No authority is cited sustaining the assumption. The cases of Waterman vs. Means, 12 Penn. St., 99, and Boden vs. Gladding, 21 Penn. St., 50, are cases of special circumstances and establish no doctrine inimical to our case.

NOURSE & KAUFFMAN,
for Appellees.

C. C. NOURSE, *of Counsel.*

The release by the executors was a release and transfer only of their equitable interest in the assetts of T. E. Brown & Co to wit: the assetts remaining after a full settlement of the partnership affairs including any and every liability of Langdon the firm

Menamph vs Whitwell 52 N.Y. 163
Baldwin v Bates 48 N.Y. 673
Farley v Fay 14 Hun 67
Flynn v Fish 7 Lansing 114